FILED
JUN 6 1983
ALEXANDER L. STEVAS,
CLERK

82-6881

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES P. FREE, JR., Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

G. JOSEPH WELLER, Deputy Defender
PAUL J. GLASER, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

June 6, 1983

QUESTIONS PRESENTED FOR REVIEW

I. Is the Eighth Amendment ban on unguided discretion in capital cases violated by a sentencing scheme that places no defined limits on factors that may be considered as reasons for imposing death, particularly where the sentencer is presented with irrelevant and highly prejudicial evidence, including testimony regarding the families of the victims of the offense?

II. Does the prohibition against capricious and freakish imposition of the death penalty require any specific form of "proportionality review" prior to execution of a death sentence?

III. Does the standardless, post-trial discretion given to Illinois prosecutors to convene a death penalty hearing in murder cases violate the Eighth and Fourteenth Amendments?

IV. Absent any reason for the police to fear for their safety or to believe another person is within the premises, does a "protective sweep" of premises subsequent to the removal of an arrestee from those premises constitute an unreasonable search?

TABLE OF CONTENTS

	Page
Opinion Below	5
Jurisdiction	5
Constitutional and Statutory Provisions Involved	6
Statement of the Case	8
Reasons for Granting the Writ	15
I. Where the Illinois death penalty statute requires the sentencer to consider aggravating factors which are left undefined and, pursuant to that mandate the jury below was directed to consider irrelevant and highly prejudicial evidence under the guise of "aggravation," certiorari should be granted to review whether the procedure comports with the Eighth and Fourteenth Amendments and especially in light of Barclay v. Florida, presently pending before this Court	15
II. This Court should grant certiorari to resolve a question presently pending in Pulley	

v. Harris: Whether the Eighth and Fourteenth Amendments require any specific form of "proportionality review" prior to execution of a state death sentence..... 20

III. The convening of a hearing to consider the imposition of the death penalty only "where requested by the State" under section 9-1(d) of the Illinois Death Penalty Act violates the Eighth and Fourteenth Amendments by allowing prosecutors to exercise standardless discretion in seeking the penalty..... 22

IV. Certiorari should be allowed to consider whether a "protective sweep" of premises subsequent to the removal of the arrestee from those premises violates the Fourth and Fourteenth Amendments as an unreasonable, general search where the police have no reason to fear for their own safety and no reason to believe another person might be within the premises..... 25

Conclusion..... 30

Appendices

Opinion of the Illinois Supreme Court..... App. A

Order of the Illinois Supreme Court Denying Rehearing.. App. B

TABLE OF AUTHORITIES

Page

Barclay v. Florida, 411 So.2d 1310 (Fla. 1982), No. 81-6908 (orally argued, Mar. 30, 1983) 33 Crim.L.Rep. (BNA) 4024..... 15,17,19

Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978)..... 16

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)..... 16

Foster v. State, 266 So.2d 97 (Fla.Dist.Ct.App. 1972)..... 16

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)..... 16,22,23

Gagliano v. State, 97 Nev. 297, 629 P.2d 781 (1981)..... 27

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)..... 19

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980)..... 16

Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983)..... 17

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)..... 20,22,23,24

Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert.granted sub nom. Pulley v. Harris, No. 82-1095 (Mar. 21, 1983), 32 Crim.L.Rep. (BNA) 4229..... 17,20,21,22

Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds, ___U.S.___, 102 S.Ct. 2922, 73 L. Ed.2d 1326 (1982), aff'd, 636 F.2d 311 (5th Cir., Unit B. 1982)..... 17,18

Hopkins v. Alabama, 524 F.2d 473 (5th Cir. 1975)..... 27

Page

Hopper v. Evans, 456 U.S. ___, 102 S.Ct. 2049, 72 L.Ed. 2d 367 (1982)..... 16

Knight v. State, 142 So.2d 899 (Ala. 1962)..... 16

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)..... 16

McGeehan v. Wainwright 526 F.2d 397 (5th Cir. 1976)..... 25,27

Newton v. State, 378 So.2d 297 (Fla.App. 1980)..... 27

People v. Bartik, 94 Ill.App.3d 696, 418 N.E.2d 1108 (2d Dist.,1981)..... 21

People v. Bernette, 30 Ill.2d 359, 197 N.E.2d 436 (1964).... 17

People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181 (1980).... 20

People v. Connolly, 55 Ill.2d 421, 303 N.E.2d 409 (1973).... 26

People v. Dukes, 12 Ill.2d 334, 146 N.E.2d 14 (1957)..... 17

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)..... 15,17,18,19 20,21,22,25, 26,28

People v. Gualandi, 21 Ill.App.3d 992, 316 N.E.2d 195 (4th Dist., 1974)..... 26

People v. Jackymiak, 381 Ill.2d 528, 46 N.E.2d 50 (1943).... 16,17

People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981).... 21,24

People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981)..... 23

People v. Lewis, 75 Ill.App.3d 259, 393 N.E.2d 198 (1st Dist., 1979)..... 28

People v. Miller, 6 N.Y.2d 152, 188 N.Y.S.2d 534, 160 N.E. 2d 74 (1959)..... 16

People v. Wilson, 55 Ill.2d 302, 281 N.E.2d 626 (1972)..... 17

People v. Winston, 106 Ill.App.3d 673, 435 N.E.2d 1327 (2d Dist., 1981)..... 21

People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979)..... 22

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976)..... 20

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)..... 17

Root v. Gauper, 438 F.2d 361 (8th Cir. 1971)..... 26

Ruiz v. Illinois, No. 82-6466, cert.docketed March 25, 1983. 24

Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920)..... 29

State v. Bartholemew, 654 P.2d 1170 (Wash. 1982)..... 17

State v. Ranker, 343 So.2d 189 (La.1977)..... 28

State v. Tolliver 5 Wash.App. 321, 487 P.2d 264 (1971)..... 27

State v. White, 15 Ohio St.2d 146, 239 N.E.2d 65 (1968)..... 16

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)..... 27

Page

United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973)..... 29

United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972). 26

United States v. Kinney, 638 F.2d 941 (6th Cir. 1981)..... 29

Wade v. Commonwealth, 116 S.E.2d 99 (Va. 1960)..... 16

Walker v. State, 338 S.W.2d 13 (Ark. 1965)..... 16

Williams v. Maggio, 679 F.2d 381 (5th Cir., Unit A. 1982).... 21

Constitutional provisions and statutes

Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1..... 15,18,20, 22,25

Ill.Rev.Stat., 1977, Ch. 110A, Sec. 603, 606(a), 607(a) 611(a), 613(a)..... 20

U.S.Const. amend IV..... 25,26

U.S.Const. amend VIII..... 15,16,19, 20,23

U.S.Const. amend XIV..... 15,16,20, 26

Textbooks, etc.

Administrative Office of the Illinois Courts, 1978 Annual Report to The Supreme Court of Illinois..... 21

Administrative Office of the Illinois Courts, 1979 Annual Report to the Supreme Court of Illinois..... 21

67 A.L.R.2d 731..... 16

Brief for Defendant, People v. James Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)..... 21

C.J.S. Homicide Sec. 225..... 16

2 Lafave, Search and Seizure Sec. 6.5(c)(1978)..... 25

Reply Brief for Defendant, People v. James Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)..... 21

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES P. FREE, JR., Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

The petitioner, James P. Free, Jr., prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois holding, in conflict with decisions from other state and federal courts, that a search can be justified as a "protective sweep" absent sufficient grounds and, further, that a sentence of death was properly imposed and that the Illinois death penalty statute does not violate the Eighth Amendment's proscription of cruel and unusual punishment.

OPINION BELOW

The opinion of the Supreme Court of Illinois was filed on January 24, 1983, and is reported at 94 Ill.2d 378, 447 N.E.2d 218. A copy of the opinion is attached hereto as Appendix A. A petition for rehearing was denied by the Illinois Supreme Court on April 8, 1983. A copy of the court's latter order appears in Appendix B.

JURISDICTION

This petition is being filed within sixty days of the Illinois Supreme Court's denial of rehearing on April 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provision for convening a capital sentencing hearing following an Illinois defendant's conviction for murder is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(d):

> Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). ...

The statutory aggravating factor involved in this case is found in Ill.Rev.Stat., 1978, Ch. 38, Sec. 9-1(b)(6):

> (b) Aggravating factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:
>
> ... 6. the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual was killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and
>
> (b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and
>
> (c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child....

The provision for consideration of additional aggravating factors at the death sentencing proceeding is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(c) and 9-1(e):

> (c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b)....
>
> (e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

The provision for review of a conviction and sentence of death is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(i):

> Appellate Procedure.
> The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

STATEMENT OF THE CASE

James P. Free, Jr., the petitioner, was charged by indictment with the April 24, 1978 attempt rape and attempt murder of Lori Rowe and the attempt rape and murder of Bonnie Serpico, at the M-2 Service Center in Glen Ellyn, Illinois.

Lori Rowe and Bonnie Serpico were working at M-2, a 24-hour data processing office, on the night of April 23-24. At about 3:50 a.m., Rowe looked up from her desk and saw a man standing inside the front door. A white towel was secured around the man's head with twine, covering his face from the bridge of the nose to the bottom of his neck. The towel never came away from his face; she saw only his eyes, forehead and hair. He had a gun in one hand and carried a cloth bag in the other hand. (C. 4902-4922, 4949-4953, 5043-5044, 5164)

The man motioned Rowe toward the back room. As she got up, Serpico, who had been in the back, entered into the front room. The man then told both women to go to the back room. They proceeded into the office's lunchroom, where the women asked the man to take their money and leave them alone. He ordered the women to lie on the floor and to take their clothes off, saying he wanted to "rape" them. (C. 4908, 4913, 4915, 5033-5036, 5180)

Rowe said the man did not talk very much; he talked in short sentences, at times not responding to the women's statements and at times appearing scared, as if he was losing control of the situation. (C. 5029, 5039)

After he tied up Rowe, the man took Serpico into another room where Serpico removed her clothing. During this time, the man went back and forth, about three to four times, between the two rooms, to check on Rowe's bindings. While the man checked Rowe on the last occasion, Serpico ran from the room she was in and headed towards the front door. The man stepped from the lunchroom and fired one shot, killing Serpico. He returned to the lunchroom and fired a second shot at Rowe, striking her in her right arm, chest and left leg. The man then ran from the premises. (C. 4869, 4921-4926, 4939A)

Rowe said the entire incident lasted about twenty minutes. (C. 5040) The man never removed his clothes. (C. 4993) She identified the petitioner as the man in question. (C. 4928) After being shot, Rowe telephoned the police, who arrived fifteen minutes later. (C. 4926-4930, 4711, 4714, 4741, 4742)

Through police investigation, suspicions focused on the petitioner, whom the police learned was staying at his parents' townhouse in Dubuque, Iowa, on leave from the army.

On April 25, prior to proceeding to Dubuque, three Glen Ellyn police officers went to a fishing barge on the Mississippi River near Hazel Green, Wisconsin, the home of the petitioner's parents. (C. 2104, 2105-2111) His mother, Lillian Free, told the police her son was in the Dubuque townhouse, alone. (C. 2112) James P. Free, Sr., the petitioner's father, explained that he rented a residence at 1961 Stanton. Neither Lillian nor James, Sr., gave consent to search the townhouse, and neither was served with a copy of a warrant until two or two and a half hours after Mr. Free, Sr. arrived on the scene of the townhouse at 7:00 or 7:30 a.m. (C. 2120, 2122-2139)

At 5:00 a.m., the Glen Ellyn police officers arrived in Dubuque and informed the Dubuque police that the petitioner was being sought for his possible involvement in a homicide and was armed with a .38 or .357 caliber hand-gun. (C. 1291, 1293, 1294) By 6:15, police began to assemble at 1961 Stanton. (C. 1262) Estimates of the number of officers present ranged from nine to twenty, (C. 1295, 1385, 1523, 1647, 1801), with approximately five squad cars and other emergency vehicles, including a fire truck. (C. 1296, 1999)

The police announced their presence over a public address system aimed at the townhouse and informed the petitioner about the warrant for his arrest. After thirty to thirty-five minutes of repeated warnings to surrender went by without a response, a tear gas projectile was fired into a second-story window. (C. 1267, 1274) The petitioner testified he was awakened by the sound of breaking glass and looked out a window and saw the police. Already wearing a t-shirt, socks and shorts, he put on a pair of trousers and went outside, unarmed, with his

hands up. He was told to lie down, so he went over to the grass in front of the building. He saw several officers with shotguns drawn on him, some fifteen to twenty feet away. He did not feel free to walk away. His pants were falling, so he asked for permission to pull them up. He was told "no" and ordered to lie down; he went down, lying flat on his stomach. (C. 1858-1864)

While on the ground, the petitioner felt a shotgun aimed two or three feet from his head. He was handcuffed and asked about a gun; he said it was in the house. He was also asked if anyone else was in the house; he answered no. He was then grabbed and pulled into a squad car. (C. 1871, 1872)

A couple of minutes after the petitioner was taken away from the townhouse, a group of police officers entered the residence, wearing gas masks. According to Dubuque Police Captain Patrick Egan, the officers came out shortly, complaining that the gas masks were not functioning properly. Egan entered the building, without a mask, along with the second group of police. He entered, he said, to make certain that no one else was inside the building; he was also concerned about the tear gas projectile starting a fire or having hit someone. His first trip inside the house lasted no more than 30 seconds before his eyes began stinging from the tear gas. During this trip he proceeded to the second floor, finding no one else inside; nothing was seized during this search. A few minutes later, Egan and a few other officers made a second trip into the building. During the second search, the tear gas cylinder was found, having scorched the floor on which it lay. A minute or so later, Egan left the building again, to return for third and fourth searches. During the fourth trip, an exhaust fan was placed inside the building. Egan testified that he never entered the building for the purpose of obtaining evidence; closets and drawers were not opened. He never saw anyone pick up anything from inside the building aside from the gas projectile. (C. 1933-2003)

Dubuque Police Captain Terrence Lambert testified that he gave no orders to check the building for others and did not hear Egan, who was in command of the police unit on the scene, give

any such order. Lambert said they assumed the thing to do was to go inside the building. He admitted that no consent or warrant had been obtained for the preliminary entries into the building. The fire hazard, he said, was confined to the second floor. (C. 2098-2103)

Glen Ellyn Police Detective Robert Velon, during one of the preliminary searches of 1961 Staton, saw some twine on top of a garbage bag near the kitchen on the first floor of the building. The twine was similar to twine he recalled seeing at the scene of the incident in Glen Ellyn. Velon did not seize the twine from the townhouse on this occasion. (C. 2195-2205) He related his observation to a magistrate in Dubuque who subsequently issued a search warrant. (See 79-88; 2196) The magistrate's endorsement noted only two factors upon which probable cause was found for the issuance of a warrant to search the townhouse: Velon's observation of the twine and Free's statement immediately after his arrest that the gun was in the house. (Supplemental Record) Pursuant to that warrant, police seized a gun, ammunition, items of clothing and other evidence which linked the petitioner to the offense and were admitted at the trial and sentencing proceedings.

During the pretrial hearings on motions to suppress statements and evidence, the defense introduced a videotape of the petitioner's arrest, prepared by a Dubuque television station which was reporting the incident. (Df.Ex. 5; C. 1921-1922, 2236)

In response to defense motions, the petitioner's statements made at the scene of the arrest were suppressed for purposes of the trial; the statements were allowed to stand as support for probable cause for the search warrant. (C. 3165) The trial court denied the motion to suppress the search of the townhouse, stating that the search was justified by probable cause and the exigencies of the situation. (C. 2175-3184)

At trial, supplementing testimony from Lori Rowe, investigating police officers and other witnesses placing the petitioner in the Glen Ellyn area on the date of the offense, the State presented evidence that a fingerprint found on the front door knob of the

M-2 Service Center and a palm print on the door frame to M-2's storage room matched prints taken from the petitioner. (C. 5533, 5534, 5797, 5799, 5848, 5865, 5887, 5889, 5892; Pl.Ex. 71, 72, 73, 91, 93) A tool mark and firearms examiner testified that, when he received a gun seized from the Free townhouse, (Pl.Ex. 17; C. 5913), it had been cleaned since it was last fired. (C. 5682, 5702) Based upon his tests, the examiner concluded that the projectile extracted from Bonnie Serpico's body could have been fired from the gun found at the townhouse. (Pl.Ex. 74; C. 5696-5705, 5839)

In his defense, the petitioner claimed to have no actual recollection of the circumstances surrounding the offense. Through his own testimony, (C. 6350-6491), and testimony from other witnesses, including two psychiatrists and one toxicologist, (C. 6628-6917), the petitioner sought to establish that, at the time of the incident, he was suffering from a "toxic psychosis secondary to a chemical or drug intoxication," (C. 6647-6648), induced by his ingestion of alcohol and P.C.P., or phencyclidine, prior to the incident. A "psychopharmacologist" testified for the State to dispute the evidence regarding drug intoxication. (C. 6981-7219)

On June 22, 1979, at the conclusion of a 26-day trial, the petitioner was found guilty of the murder and attempt rape of Bonnie Serpico and the attempt murder and attempt rape of Lori Rowe. (C. 628, 630-632, 7795)

Prior to the convening of the two-stage death penalty sentencing hearing, on August 1, 1979, the petitioner filed a motion to declare the Illinois death penalty statute unconstitutional. One of the grounds of the motion alleged that the statute fails to designate standards under which the State may seek to prosecute a murder case as a capital case and is therefore violative of the Eighth and Fourteenth Amendments. (C. 827, 7880) The trial court denied the motion. (C. 7892)

At the first-stage of the sentencing proceeding, held to determine the existence of statutory aggravating factors, the jury found that the murder of Bonnie Serpico occurred in the course of a rape and in the course of a burglary, (C. 8015-8016),

thereby rendering the death penalty available against the petitioner.

The second and final phase of the sentencing hearing took place on August 2, 6 and 7, 1979, when evidence in aggravation and mitigation was presented by both sides.

In aggravation, over defense objection, (C. 8053), the State was permitted to present testimony regarding the effects of the offenses upon the victims and their families. (C. 8056-8061, 8078-8084, 8098) Also over defense objection, (C. 8114), a police officer was allowed to testify about having observed the petitioner, at 4:00 in the morning on the day before the instant offense, driving slowly through the business district of nearby Winfield, Illinois. Although the officer stopped and talked with the petitioner at the time, no crime was committed. (C. 8115-8122)

The State also offered testimony regarding the petitioner's educational and employment history. He was characterized as an average to above average student while in high school and an extremely good worker while employed prior to enlisting in the army. (C. 8086-8092) It was also indicated that the petitioner had a previous conviction, for misdemeanor theft, in 1972. (C. 8063)

In mitigation, several members of the petitioner's family offered positive testimony about his childhood and family life. (C. 8144-8178, 8208-8223, 8274-8286) Three army officers testified about his exemplary service record. (C. 8224-8272) A psychiatrist opined that the petitioner's conduct in the offense was out of his character. (C. 8192) The petitioner also made a statement on his own behalf. (C. 8353-8360)

On August 7, 1979, the jury returned a verdict recommending that the petitioner be sentenced to death. (C. 997, 8465) The court thereupon entered judgment on the verdict. (C. 8468)

In his post-trial and post-sentencing motions, the petitioner cited as error the denial of his pretrial suppression motions relating to the search of his townhouse and the allowance of testimony at the final sentencing hearing regarding the victim's families and the petitioner's activities in Winfield 24 hours before the offense. (C. 1001 et. seq.) The petitioner also raised

issue with the absence, in the death penalty statute, of constitutionally sufficient guidelines for prosecutorial discretion. (C. 1038) All the petitioner's post-trial and post-sentencing motions were denied. (C. 8637, 8650, 8656, 8888-8894) On November 27, 1979, the petitioner was sentenced on the remaining charges: two concurrent 15 year prison terms for attempt rape and a consecutive 30 year prison sentence for attempt murder. (C. 8846-8849)

In his direct appeal to the Illinois Supreme Court, the petitioner raised sixteen issues relating to errors in his trial and sentencing. Affirming his conviction, the Illinois Supreme Court ruled that the entries and searches of the petitioner's house were justified under the exigencies of the arrest and as valid "protective sweeps." People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 226 (1983). The court rejected the petitioner's federal constitutional challenge to the permission granted in the Illinois statute to consider nonstatutory aggravation by finding that the sentencing body is "suitably directed and limited" under the statute. 447 N.E.2d at 242. Relying on previous decisions, the court further rejected constitutional challenges to the unlimited grant of discretion afforded the sentencing decision of Illinois prosecutors and to the inadequacy of the court's comparative review procedures. 447 N.E.2d at 224.

On April 8, 1983, the Illinois Supreme Court denied a petition for rehearing. (Appendix B.)

REASONS FOR GRANTING THE WRIT

I.

WHERE THE ILLINOIS DEATH PENALTY STATUTE REQUIRES THE SENTENCER TO CONSIDER AGGRAVATING FACTORS WHICH ARE LEFT UNDEFINED AND, PURSUANT TO THAT MANDATE THE JURY BELOW WAS DIRECTED TO CONSIDER IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE UNDER THE GUISE OF "AGGRAVATION," CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE PROCEDURE COMPORTS WITH THE EIGHTH AND FOURTEENTH AMENDMENTS AND ESPECIALLY IN LIGHT OF BARCLAY V. FLORIDA, PRESENTLY PENDING BEFORE THIS COURT.

This Court granted certiorari in Barclay v. Florida, 411 So.2d 1310 (Fla. 1982), No. 81-6908 (orally argued, Mar. 30, 1983) 33 Crim.L.Rep. (BNA) 4024, in part on the issue of whether the sentencing authority in a capital prosecution can consider nonstatutory aggravating circumstances in making its decision. A similar issue exists in the instant case, aggravated by the utterly irrelevant and highly prejudicial nature of the nonstatutory evidence. Not only was the sentencing authority here, a jury, presented with irrelevant and inflammatory evidence including testimony regarding the families of the victims of the offense, but the jury was instructed that consideration of this evidence was required before its sentencing decision could be reached.

The evidence and instructions presented below, endorsed by the Illinois Supreme Court as appropriate under the Illinois death penalty statute, People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 241-242 (1983), blatantly conflicts with the Eighth and Fourteenth Amendments to the United States Constitution, as well as precedent from this Court, and requires this Court's review.

The Illinois death penalty statute, Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(c), mandates that the sentencing body, whether the trial court or a jury, "consider any aggravating ... factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b)."* Thus, under Illinois law,

---

* Subsection(b), Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b), sets forth a number of "aggravating factors" which constitute the prerequisites for application of the death penalty, such as murder of a peace officer or fireman or a murder committed in the course of another, enumerated felony. The statutory aggravating factors at bar were that the murder occurred in the course of a rape and in the course of a burglary.

the decision of the sentencer is not channeled but is broadened to permit the consideration of nonstatutory factors in violation of the Eighth and Fourteenth Amendments.

This Court, in capital cases beginning with Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), has required that sentencing discretion be directed and limited so that a "meaningful basis [exists] for distinguishing the ... cases in which it is imposed from ... the cases in which it is not." Lockett v. Ohio, 438 U.S. 586, 601, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); see also Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); Hopper v. Evans, 456 U.S. ___,___, 102 S.Ct. 2049, 72 L.Ed.2d 367, 373 (1982). Allowing imposition of the death penalty to be based on nonstatutory aggravating factors is inconsistent with this fundamental constitutional requirement of channeled discretion and rational, consistent application of the death penalty. Cases involving identical statutory aggravating factors could nonetheless result in different sentencing decisions because the trial court in one case elected to allow evidence and instructions on nonstatutory factors while the other court did not.

The opinion of the Illinois Supreme Court below has done nothing to insure the concept of fairness and reasonable consistency which this Court has set forth as a minimum safeguard against the arbitrary and capricious imposition of the death penalty. See Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It has long been the law in Illinois, as it has been elsewhere*, that evidence of the effect of the offense upon the homicide victim's families serves no purpose other than to arouse passion and prejudice against the defendant and is irrelevant and inadmissible. People v. Jackymiak, 381

---

* See e.g., Knight v. State, 142 So.2d 899 (Ala. 1962); Walker v. State, 338 S.W.2d 13 (Ark. 1965); Foster v. State, 266 So.2d 97 (Fla.Dist.Ct.App. 1972); People v. Miller, 6 N.Y.2d 152, 188 N.Y.S. 2d 534, 160 N.E.2d 74 (1959); State v. White, 15 Ohio St.2d 146, 239 N.E.2d 65 (1968); Commonwealth v. Story, 476 Pa.391, 383 A.2d 155 (1978); Wade v. Commonwealth, 116 S.E.2d 99 (Va. 1960); See also C.J.S. Homicide Sec. 225; 67 A.L.R.2d 731.

Ill.2d 528, 46 N.E.2d 50 (1943), People v. Dukes, 12 Ill. 2d 334, 146 N.E.2d 14, 19 (1957), People v. Bernette, 30 Ill. 2d 359, 197 N.E.2d 436 (1964), People v. Wilson, 55 Ill.2d 302, 281 N.E.2d 626, 629 (1972). Although the court's opinion implicitly approved such testimony in the instant case, the court failed to explain the relevance of the testimony to the question of the petitioner's sentence or expressly overrule, let alone question, the rationale of the Jacymiak, Dukes, Bernette and Wilson cases. See People v. Free, 447 N.E.2d at 241-242. Trial courts in capital cases in Illinois are thus left in a quandry of whether to follow or abandon historical precedent. Without explicit statutory guidance, the individual discretion of the 800 judges in the State of Illinois will render consistency impossible.

The conclusion that the Illinois death penalty scheme violates the prohibition against unbridled discretion is further supported by the holding in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds, ___U.S.___, 102 S. Ct. 2922, 73 L.Ed.2d 1326 (1982), aff'd, 686 F.2d 311 (5th Cir., Unit B. 1982), where it was held unconstitutional to instruct a sentencing jury that in considering aggravating circumstances it was not limited to factors specified by statute. Henry has recently been followed in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), and State v. Bartholemew, 654 P.2d 1170, 1183 (Wash. 1982). But see, Harris v. Pulley, 692 F. 2d 1189, 1194 (9th Cir. 1982), cert. granted sub nom. Pulley v. Harris, No. 82-1095 (Mar. 21, 1983). As noted above, the Henry rationale is one of the issues pending before this Court in Barclay v. Florida.

[1] In the case against the petitioner, the sentencing jury was instructed to consider "any aggravating factors and any mitigating factors which are relevant to the imposition of the death penalty." The jury was further instructed that: "Aggravating factors are those facts and circumstances which provide reasons for imposing a more severe sentence." (See court's instructions to jury, beginning at C. 8439) Thus informed that it need not consider as aggravation only those statutory factors already found at the first-stage hearing, murder in the course of a

rape and in the course of a burglary, (C. 8015, 8016), the jury may well have believed that other, nonstatutory factors were legitimate reasons for imposing a sentence of death. Those other factors, presented through testimony proffered by the State, included: that Bonnie Serpico's father died of cancer a month after the offense, that her mother took tranquilizers for depression and that her husband developed a drinking problem, (C. 8056-8061); that Lori Rowe was now afraid of the dark and requested a private room at school. (C. 8075-8079) The State was also allowed to argue to the jury that Serpico left a husband and two daughters. (C. 8408) In addition, the State was permitted to present testimony asserting that the petitioner had been "prowling" the west suburban area 24 hours before the instant offense. (C. 8111-8119, 8379-8392)

The Illinois Supreme Court rejected petitioner's claim of error based on the Henry rationale by concluding that Illinois procedure, which provides for a three-phase capital prosecution, is "different" from Florida's law, which provides for only two phases. People v. Free, 447 N.E.2d at 242. The Illinois Supreme Court's opinion thus rests upon a distinction without a difference. Regardless of whether a two- or three-stage proceeding is involved, if a jury deliberating on the question of life or death is not carefully and particularly directed to consider only specific statutory aggravating factors, its decision may well result in a wholly arbitrary and capricious death verdict.

The instruction which was forbidden in Henry, ("In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following...." 661 F.2d at 57), is strikingly analogous to both the instruction tendered to the jury below, and, equally important, practically identical to the Illinois death penalty statute, Sec. 9-1(c): "Aggravating factors may include but need not be limited to those factors set forth in subsection (b)." (emphasis added). Inasmuch as the language of the instruction failed to provide proper direction to the jury, it must be held reversible error.

Inasmuch as the language of the statute contravenes any notion of direction or limitation, the statute itself must be found unconstitutional.

It must be noted that the Illinois Supreme Court's finding of waiver on the issue of the admissibility of the suspect testimony, People v. Free, 447 N.E.2d at 241, is not supported by the record. Defense trial counsel objected to the testimony both contemporaneously, (C. 8053, 8114), as well as in a post-trial motion for new trial. (See post-trial motion at 15-16; in Common Law Record at C. 1001 et seq.)

Because death is qualitatively different from any other kind of punishment, there is the greatest need that the procedure for imposing the penalty of death comport with due process in order to insure that the imposition of death is not the result of passion or prejudice. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Allowing the sentencing body to hear and consider irrelevant testimony dealing with a non-statutory factor constitutes a quantum step backward from all concepts of due process and results in an arbitrary and capricious punishment violative of the Eighth Amendment. Especially in light of the pendency of a similar issue before this Court in Barclay v. Florida, this Court should grant certiorari and reverse the sentence of death affirmed by the Illinois Supreme Court.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A QUESTION PRESENTLY PENDING IN PULLEY V. HARRIS: WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE ANY SPECIFIC FORM OF "PROPORTIONALITY REVIEW" PRIOR TO EXECUTION OF A STATE DEATH SENTENCE.

An Illinois defendant's capital conviction and death sentence is subject to automatic review by the Illinois Supreme Court. The death penalty statute provides that "review shall be in accordance with rules promulgated by the [Illinois] Supreme Court." Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(i). Although the Illinois Supreme Court has enacted a series of rules dealing primarily with procedural matters of docketing and briefing of capital cases, Ill.Rev.Stat., 1977, Ch. 110A, Sec. 603, 606(a), 607(a), 611(a), 613(a); see, People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 198 (1980); People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 224 (1983), none of these rules provide for any meaningful comparative review of similar crimes and defendants which alone can insure uniformity and parity of sentences in murder prosecutions in the State of Illinois.

The Illinois Supreme Court's failure to adopt any substantive procedure for proportionality review violates the requirement of the Eighth and Fourteenth Amendments that the death sentence not be imposed capriciously or in a freakish manner. Gregg v. Georgia, 428 U.S. 153, 204, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Profitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). This conclusion also follows from the holding in Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), cert. granted sub nom. Pulley v. Harris, No. 82-1095, 32 Crim L.Rep. (BNA) 4229, where the Ninth Circuit Court of Appeals remanded a capital case to enable the California Supreme Court to determine, specifically, whether the penalty in the case was "proportionate to other sentences imposed for similar crimes."

On March 21, 1983, this Court granted certiorari in the Harris decision, 32 Crim L. Rep (BNA) 4229, to review two questions: whether any specific form of proportionality review is required by the federal Constitution and, if so, what is the required focus, scope and procedural structure of such review.

Affirming the petitioner's death sentence, the Illinois Supreme Court compared the instant offense with those in four other capital cases of recent years: three of which resulted in affirmances and one of which resulted in the vacature of the death sentence. People v. Free, 447 N.E.2d at 243. This attempt at proportionality review is as constitutionally insufficient as was the absence of any review in Harris.

In his briefs before the Illinois Supreme Court, Mr. Free called the court's attention to over 80 Illinois cases in which, although applicable, the death penalty either was not sought by the State or was not imposed by the sentencing authority. Brief for Defendant, People v. James Free, Docket No. 52775, at C. 1-6; Reply Br. at 47-48, 60. No comment on the lists appears in the court's opinion.

Comparison of cases on a statewide basis is not an impossible task. The Illinois Supreme Court already reviews and publishes data regarding the numbers of criminal cases. See Administrative Office of the Illinois Courts, 1978 Annual Report to the Supreme Court of Illinois, at p. 170-180; Administrative Office of the Illinois Courts, 1979 Annual Report to the Supreme Court of Illinois, at p. 166-176. For example, in 1979, the year of the petitioner's trial, there were 352 murder convictions in Illinois. The death penalty was imposed for only 12 of these convictions. 1979 Report at 172. The raw statistics provided in the report, however, offer no basis for meaningful comparative review of similar prosecutions.

Even if comparative review need only be limited to consideration of cases at the judicial district-level, see Williams v. Maggio, 679 F.2d 381, 395 (5th Cir., Unit A. 1982), three of the eighty cases presented to the Illinois Supreme Court below arose out of the same county as the petitioner's case, DuPage County: People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981), People v. Bartik, 94 Ill.App.3d 696, 418 N.E.2d 1108 (2d Dist., 1981), and People v. Winston, 106 Ill.App.3d 673, 435 N.E.2d 1327 (2d Dist., 1981). Had the Illinois Supreme Court compared the facts and circumstances of these three cases against

the petitioner's case, it would have discovered a sharp example of the arbitrary application of the death penalty in DuPage County.

Only when provided with information regarding all similar murder cases, whether on a statewide or county-wide basis, can the Illinois Supreme Court undertake the type of review set forth by this Court in Gregg v. Georgia.

Inadequate comparative review has already , in Illinois, led to the arbitrary and capricious imposition of the death penalty condemned by this Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 349 (1971). Since the instant issue is similar to the question before this Court in Pulley v. Harris, this Court should grant certiorari in this case and reverse the sentence of death affirmed by the Illinois Supreme Court.

III.

THE CONVENING OF A HEARING TO CONSIDER THE IMPOSITION OF THE DEATH PENALTY ONLY "WHERE REQUESTED BY THE STATE" UNDER SECTION 9-1(d) OF THE ILLINOIS DEATH PENALTY ACT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BY ALLOWING PROSECUTORS TO EXERCISE STANDARDLESS DISCRETION IN SEEKING THE PENALTY.

In Illinois a sentence of death may never be imposed unless it is requested by the prosecutor after conviction. It is only where the special sentencing procedures provided in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(d) are invoked by the prosecutor, in his sole discretion, that the court is empowered to impose the death sentence.

In every other state, a death penalty hearing automatically follows the conviction. In Illinois, after a conviction for murder, a death penalty can be held only "[w]here requested by the State." Sec. 9-1(d). The Illinois Supreme Court recognizes that this statutory language places the decision on whether to convene a death hearing entirely in the hands of the Illinois prosecutor. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979); People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218, 224 (1983) Four of the seven justices now sitting on the Illinois Supreme Court believe that the Illinois statute violates

the Eighth Amendment. See People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981). Nevertheless, for reasons ranging from stare decisis to reliance on this Court to review the issue, Lewis, 430 N.E.2d at 1364 (Goldenhersch, C.J., and Ryan, J. and Clark, J. concurring), the court has declined to invalidate the statute as unconstitutional.

The hesitancy of the Illinois Supreme Court cannot hide the conclusion that the statute is unconstitutional in terms of the decisions from this Court. In Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court stated that because of the uniqueness of the death penalty, it cannot be imposed under procedures that create "a substantial risk that it would be inflicted in an arbitrary and capricious manner." Any discretion afforded on the life or death decision "must be suitably directed and limited so as to minimize the risk of the wholly arbitrary and capricious action." 428 U.S. at 189.

The discretion granted Illinois prosecutors to decide whether to convene a death penalty hearing is completely unfettered. The failure to "suitably direct" the prosecutor's post-trial discretion creates the same problem raised by a failure to "suitably direct" the sentencing body's discretion.

Since the decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), it has been clear that such absolute discretion in a capital sentencing scheme violates the Constitution. Rather than minimizing the risks of arbitrariness and capriciousness, the Illinois statute injects those forbidden characteristics into the Illinois capital sentencing process. Because there are absolutely no guidelines anywhere in the statute to govern a prosecutor's exercise of discretion, the State need not seek the death penalty in any case and in fact, when faced with a similar or identical factual situation or similarly situated defendants, the State could in good faith request a death sentence in one case and not in the other, all the while acting in accord with the statute. Further, the Illinois Supreme Court, as yet, has failed to offer any guidance on the issue.

Perhaps the most glaring example of prosecutorial abuse can

be found in another recent DuPage County murder case, People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344, 353 (1981), where the Illinois Supreme Court noted" "[T]he defendant, a young man with a significant history of criminal activity, acted with premeditated, cold-blooded deliberation in deciding to kill a cab driver, a homicide for which the death penalty could have been sought, had the prosecutor elected to do so." (Emphasis added). The fact remains that the same prosecutor's office which decided not to seek the death penalty for Phillip LaPointe is now urging the execution of James Free. The absurdity of the present statute is thus revealed by a comparison of these two cases.

This Court, in Gregg, see 428 U.S. at 199, recognized that certain types of pre-trial prosecutorial discretion, such as the inherent power to undercharge, not charge at all, or plea bargain, are unavoidable and an integral part of our justice system. Gregg allows the Illinois prosecutor to make those traditional pre-trial choices. However, the Illinois prosecutor is also given the power under the Illinois statute to make a vital post-trial choice: whether to convene the penalty hearing and put the defendant's life in jeopardy. It is this choice, which was not an issue in Gregg, that is challenged on Eighth and Fourteenth Amendment grounds. See also Ruiz v. Illinois, No. 82-6466, cert. docketed March 25, 1983.

There is another major difference between the discretion approved in Gregg and that allowed Illinois prosecutors. In Georgia, the only way for a prosecutor to avoid a death penalty hearing is to refuse to charge a capital offense. Such undercharging would violate his duty as a prosecutor and the public trust. As three members of this Court found, however, very few prosecutors would arbitrarily ignore both their duty and public trust by failing to charge a capital offense, when warranted by the evidence, simply to avoid a death penalty. Gregg v. Georgia, 428 U.S. at 224-5 (White, J., Burger, C.J., and Rehnquist, J.).

In contrast to Georgia, the discretion afforded prosecutors in Illinois is totally different. Since the Illinois statute

contains no standards whatever which govern the prosecutor's decision whether to seek the death penalty, the statute does not require that the prosecutor request a death penalty hearing even if his evidence establishes one or more of the statutory aggravating factors. Therefore, in contrast to Georgia, an Illinois prosecutor is free to not seek the death penalty as he sees fit, and that decision violates neither his duty nor the public trust.

The application of the death penalty in Illinois has depended upon, and will always depend upon, the unguided, personal predilection of each Illinois prosecutor. Nothing in the statute even indicates that this should not be so. Nothing directs these State's Attorneys to base their judgment on the listed aggravating factors, or on any mitigating factors. To the contrary, the unambiguous language of Section 9-1(d), that a separate sentencing hearing shall be held simply "where requested by the State," manifests a legislative intent to leave this decision totally to the absolute discretion of the prosecutor. The statute cannot withstand the critical review of this Court and certiorari in this case should therefore be granted.

IV.

CERTIORARI SHOULD BE ALLOWED TO CONSIDER WHETHER A "PROTECTIVE SWEEP" OF PREMISES SUBSEQUENT TO THE REMOVAL OF THE ARRESTEE FROM THOSE PREMISES VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS AS AN UNREASONABLE, GENERAL SEARCH WHERE THE POLICE HAVE NO REASON TO FEAR FOR THEIR OWN SAFETY AND NO REASON TO BELIEVE ANOTHER PERSON MIGHT BE WITHIN THE PREMISES.

A "protective sweep" can be defined as a general, cursory inspection of premises effected by police, for reasons of safety, subsequent to an arrest. 2 LaFave, Search and Seizure Sec. 6.4(c) 427 (1978). The concept of a protective sweep has been endorsed as a valid exception to the Fourth Amendment's warrant requirement because of the need for police officers to ensure their own safety or to seek out accomplices, due to the "'potentiality of danger surrounding the arrest,'" LaFave at 431, quoting McGeehan v. Wainwright, 526 F.2d 397,399 (5th Cir. 1976); People v. James Free, 94 Ill.2d 378, 447 N.E.2d 218, 227

(1983). Critical to application of the protective sweep doctrine, however, is the presence of factors suggesting danger subsequent to the arrest of a suspect. There being no such circumstances below, the warrantless, general search of the petitioner's townhouse subsequent to his arrest, approved under the guise of "protective sweep," was unreasonable and violated the Fourth and Fourteenth Amendments.

The Illinois Supreme Court upheld the searches of the petitioner's home as "reasonable, necessary and cursory searches under the exigencies of the [petitioner's] arrest [and] also justified as valid 'protective sweeps.'" Free, 447 N.E.2d at 226. The evidence presented at the pretrial suppression hearing demonstrates that the authorities exceeded the scope of any necessity that may have existed.

In conducting the petitioner's arrest, the police in this case fired a tear gas canister into the building, scorching the floor of a second-floor bedroom. (C. 2000) No fire ever resulted. When a tear gas canister fired into a house actually causes a fire, exigent circumstances may well justify a warrantless entry. See, e.g., People v. Connolly, 55 Ill.2d 421, 303 N.E.2d 409 (1973). However, a search beyond the area where an imminent hazard may exist is impermissible. See People v. Gualandi, 21 Ill.App.3d 992, 316 N.E.2d 195 (4th Dist., 1974). Only in the area which the emergency requires to be investigated can an officer properly search. See United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972). Furthermore, once the emergency situation no longer exists, the justification for a warrantless search likewise ceases. Root v. Gauper, 438 F.2d 361 (8th Cir. 1971). In this case, the danger of fire cannot constitute an exigent circumstance which justifies the entries into the first floor and basement of the townhouse.

Police acknowledged that they knew the tear gas canister was on the second floor and that the fire hazard was confined to that floor. (C. 2103) Moreover, the fact that the second floor could be reached without proceeding through any of the rooms on the first floor, (C. 1855-1856), made it unnecessary for officers to

go through any of those rooms to respond to the fire hazard. Thus, the searches of the first floor rooms by Dubuque and Glen Ellyn police officers cannot be justified by the potential for fire on the second floor.

Since no fire hazard existed sufficient to justify a thorough search of the entire house, the warrantless entry and search of the first floor and basement can only be condoned under a "protective sweep" theory. The totality of the circumstances render such approval inappropriate.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), this Court acknowledged the safety risks faced by police officers and their need to search particular areas in order to protect themselves in the performance of their duties. That principle, however, "must necessarily be tempered ...by a respect for the personal security and privacy of individuals which is served by the Fourth and Fourteenth Amendments." State v. Tolliver, 5 Wash.App. 321, 487 P.2d 264, 268 (1971). Before a general search of any particular premises can be undertaken, then, the police must have, at the least, reasonable cause to believe their safety is endangered. Tolliver.

Some courts have found that the "potentiality for danger" may be so high that entry and search of a premise for protective sweep purposes will be in order even if the arrest is achieved without entry and even if the arrestee is already in police custody, where an unaccounted for weapon was used in the offense, McGeehan v. Wainwright, 526 F.2d 397, or when tear gas has been used. Hopkins v. Alabama, 524 F.2d 473 (5th Cir. 1975). However, in both McGeehan and Hopkins a major additional factor, not present at bar, existed: reasonable grounds to suspect additional persons may be present in the premises. The absence of any reasonable belief in the presence of others is the distinguishing feature of the instant case, see, e.g., Newton v. State, 378 So.2d 297 (Fla.App. 1980), Gagliano v. State, 97 Nev. 297, 629 P.2d 781 (1981), and the point which renders the Illinois Supreme Court's opinion unfounded.

When police have specific information that other persons may

be in a residence after a suspect's arrest who might pose a threat to their safety, it is reasonable for them to search for others. See People v. Lewis, 75 Ill.App.3d 259, 393 N.E.2d 198 (1st Dist., 1979). However, the officers gathered outside the petitioner's townhouse had no specific reason to believe others were inside after he was arrested, so no exigency justified the entries into the first floor and basement.

One officer testified that the police had no information that anyone else was in the townhouse. (C. 2102) Another testified that only one suspect, the petitioner, was being sought and that the police had been told he was alone inside the townhouse. (C. 2062) Yet another also acknowledged that the petitioner was the sole suspect of the offense and that the police had information that he was alone. (C. 2204, 2229) There was testimony that one officer saw someone or something at both the front and rear windows of the house. Free, 447 N.E.2d at 227. However, that testimony, offered only to rebut the petitioner's claim that he was in bed sleeping, should not be construed to mean that the alleged sightings occurred simultaneously. Moreover, the officer who supposedly saw the movement in the townhouse did not testify, (C. 1268), and therefore the accuracy of that observation was never tested. In any event, the sighting occurred before the petitioner came outside and peacefully submitted to his arrest, a factor of dispositive importance. See State v. Ranker, 343 So.2d 189 (La. 1977)

Not only did the testimony of the police officers belie any fear for safety or suspicion that others were present, but a videotape of the arrest, made by a local television station, (Df.Ex. 5), completely repudiates any notion that the police feared for their safety after the petitioner walked out of the front door.

The tape shows that after the petitioner was taken from the area, most of the officers lowered their weapons. Numerous officers congregated below the second floor window, in front of the front door and first floor windows, the places from which they could easily have been fired upon, in such a way as to

indicate no concern about their safety. The one officer who specifically testified that he feared that others were inside did not even recall where his weapon was when he entered the building. (C. 2222) The officers' conduct outside the building and their method of entry into the buildings indicates that whatever fear they might have had was put to rest by the handcuffing of the petitioner.

Because the evidence below fails to include any objective facts supporting a reasonable fear on the part of the police, the Illinois Supreme Court's decision below conflicts with decisions from a number of Federal Circuit Courts of Appeal. See, e.g., United States v. Kinney, 638 F.2d 941 (6th Cir. 1981); United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973). This conflict, together with the fact that this Court has not yet specifically ruled on the permissibility, scope and focus of the protective sweep, constitutes further grounds for allowance of this petition.

As a result of the unlawful entry and search below, information was obtained which formed a cornerstone for the issuance of a search warrant for the premises. That search later yielded considerable evidence utilized by the State at the petitioner's trial and death penalty sentencing hearing: a gun purported to be the weapon used in the offense, boxes of ammunition, clothing, brown twine, a gym bag, reloading equipment, plastic ear muffs and a towel; several photographs of guns and gun equipment were also taken inside the building and used in the proceedings below. It is elementary that evidence obtained by illegal means cannot be used to obtain a search warrant. Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Because the search of petitioner's townhouse was pursuant to an invalid warrant and the conviction and sentence below was irreparably tainted by the fruits of that search, this petition should be granted and the decision below reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to issue a writ of certiorari to the Illinois Supreme Court and summarily reverse the opinion below.

Respectfully submitted,

G. JOSEPH WELLER, Deputy Defender
PAUL J. GLASER, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

APPENDIX A

Opinion Of The Illinois Supreme Court

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)

The PEOPLE of the State of Illinois, Appellee,

v.

James P. FREE, Jr., Appellant.

No. 52775.

Supreme Court of Illinois.

Jan. 24, 1983.

Rehearing Denied April 8, 1983.

Defendant was convicted in the Circuit Court, Du Page County, William V. Hopf, J., of murder, attempted murder, and attempted rape, and he appealed. The Supreme Court, Ryan, C.J., held that: (1) entry and search to determine if anyone wa in house who might pose a danger to police was justified as a protective sweep; (2) exclusion of veniremen solely on basis of their refusal to follow death penalty did not deny defendant his right to a jury representative of a cross section of community; (3) toxic psychosis prompted by voluntary ingestion of alcohol and drugs did not constitute a mental disease or defect warranting an instruction on insanity defense; (4) testimony of psychologist as to whether defendant had ability to act intentionally at time of crime was admissible in relation to defense of voluntary intoxication; (5) testimony concerning victim's family was admissible since it was not presented in a manner as to cause jury to believe that those facts were material to defendant's guilt; and (6) penalty of death was imposed after proper consideration of statutory aggravating circumstances and was neither arbitrary nor capricious.

Affirmed.

Clark, J., concurred in part and dissented in part and filed opinion in which Simon, J., joined.

Simon, J., concurred in part and dissented in part and filed opinion in which Clark, J., joined.

1. Searches and Seizures ⇐3.3(1)

Initial entries into house were reasonable, necessary and cursory searches under exigencies of defendant's arrest, and were also justified as valid "protective sweeps," given description of assailant and information which led to address, as well as obligation of police to enter premises, retrieve tear gas canister, air out house, check for fire, and determine whether there were persons present who either were in danger or posed a substantial danger. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐7(1)

In determining whether law enforcement officials acted reasonably in a given search, courts should judge the circumstances as known to the officials at the time they acted. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐3.3(1)

A warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐3.3(1)

Exigent circumstances authorizing warrantless entries for purpose of searching may also authorize warrantless entries for less intrusive purposes. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐3.3(1)

It was not necessary to wait until a fire started before the officers could effect a warrantless entry to retrieve a tear gas canister which presented a fire hazard. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐3.3(1)

Officers who had knowledge that a violent crime had been committed, that the

gun used had not been recovered, and that someone might be in the house who would have access to the weapon were justified in effecting a warrantless entry into house for a "protective sweep" to determine if anyone was in the house who might pose a danger to the police. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⇐3.3(4)

Where officer was properly in house to effect a "protective sweep," his observation of twine in plain view was properly used in affidavit to determine probable cause for issuance of a warrant to search premises for evidence of attempted rape. U.S.C.A. Const.Amend. 4.

8. Criminal Law ⇐394.4(6)

If lawfully obtained information amounts to probable cause and, apart from tainted information, would have justified issuance of search warrant, evidence seized pursuant to the warrant is admissible. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⇐3.6(2)

Whether probable cause exists for issuance of a search warrant depends upon totality of circumstances and facts known to officers and court when warrant is applied for. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⇐3.6(2)

In deciding question of probable cause for issuance of a search warrant, courts are not disposed to be unduly technical; rather, the probabilities considered are the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures ⇐3.6(2)

Probable cause for issuance of a search warrant means simply that facts and circumstances within knowledge of affiant were sufficient to warrant a man of reasonable caution to believe that the law was violated and that evidence of it is on the premises to be searched. U.S.C.A. Const. Amend. 4.

12. Criminal Law ⇐1158(4)

A trial court's determination of factual matters in a hearing on a motion to suppress will not be disturbed on appeal unless manifestly erroneous. U.S.C.A. Const. Amend. 4.

13. Jury ⇐33(2.1)

A jury qualified in compliance with *Witherspoon* does not affect the validity of a conviction.

14. Jury ⇐33(1.2)

Exclusion of veniremen solely on basis of their refusal to follow the death penalty did not deny the defendant his right to a jury representative of a cross section of the community in violation of his constitutional rights. U.S.C.A. Const.Amends. 6, 14; S.H.A. ch. 38, ¶ 9–1(d), par. 2, C.

15. Jury ⇐33(1.1)

Right to trial by jury or right to a representative jury does not include right to be tried by jurors who have stated that they will refuse to follow the law. U.S.C.A. Const.Amends. 6, 14; S.H.A. ch. 38, ¶ 9–1(d), par. 2, C.

16. Criminal Law ⇐773(1)

Toxic psychosis prompted by the voluntary ingestion of alcohol and drugs does not constitute a mental disease or defect warranting an instruction on an insanity defense. S.H.A. ch. 38, ¶¶ 6–2, 6–3.

17. Criminal Law ⇐53

An actor should not be insulated from criminal responsibility for acts which result from a temporary mental state that is voluntarily self-induced. S.H.A. ch. 38, ¶¶ 6–2, 6–3.

18. Criminal Law ⇐57

A voluntary intoxication or a voluntary drugged condition precludes the use of the insanity defense unless the mental disease or defect is traceable to the habitual or chronic use of drugs or alcohol and the use results in a settled or fixed permanent type of insanity. S.H.A. ch. 38, ¶¶ 6–2, 6–3.

19. Criminal Law ⇐655(1)

Trial court's response to State's motion to strike the insanity defense did not imply that the court would instruct the jury on that issue and, hence, did not deny defendant a fair trial on ground that by being allowed to present expert witnesses on the insanity issue he was misled into believing that jury would be instructed on insanity defense. S.H.A. ch. 38, ¶¶ 6–2, 6–3.

20. Criminal Law ⇐480

The burden of establishing the qualifications of an expert witness rests on the proponent of the testimony.

21. Criminal Law ⇐481

The trial court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular expert witness.

22. Criminal Law ⇐474

Testimony of a psychologist and psychopharmacologist on the question of the defendant's ability to act intentionally while under the influence of alcohol and PCP related to defense of voluntary intoxication and was admissible on issue whether defendant had ability to act intentionally at time of crime. S.H.A. ch. 38, ¶¶ 6–2, 6–3.

23. Criminal Law ⇐345

Testimony of police officer with respect to stopping defendant in his automobile at approximately 4:00 a.m. on day in question was relevant to place defendant in vicinity of crime within 24 hours before it was committed and was admissible.

24. Criminal Law ⇐385

A defendant's guilt must be established by competent evidence uninfluenced by bias and prejudice.

25. Criminal Law ⇐338(7), 1169.5(4)

Where testimony in a murder case respecting the fact that the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence.

26. Criminal Law ⇐338(7)

Testimony of homicide victim's spouse and his references to his family were properly admitted in that they were incidental and not calculated and were not presented in such a manner as to cause jury to believe that facts relating to victim's family were material to defendant's guilt.

27. Criminal Law ⇐404(3), 438(2)

A gun holster, boxes of ammunition, an ammunition reloading device, plastic ear muffs, a gun box, a photo of clothing and the area where it was found, and a photo of the murder weapon and related paraphernalia were relevant to prove constructive possession and control of the murder weapon and the bag in which the weapon was apparently kept, together with ammunition suitable for the commission of the crime, and were admissible.

28. Criminal Law ⇐404(3, 4)

Physical evidence may be admitted provided there is proof to connect it with the defendant and the crime; it is only necessary that the object at least be suitable for the commission of the crime, but it is not necessary that the object actually be used in committing the crime.

29. Criminal Law ⇐1169.1(10)

Admission of a gun holster, boxes of ammunition, and an ammunition reloading device, if error because evidence was irrelevant to show familiarity with guns in general and to connect defendant with the murder weapon in particular, was not prejudicial error where evidence of defendant's guilt was overwhelming and the items could not have aroused or inflamed the jury.

30. Indictment and Information ⇐113

Indictment was not fatally defective for failure to inform the defendant that the

death penalty would be sought; defendant was informed that the death penalty could be sought because he was charged with murder and attempted rape and was made aware on third day of jury selection that burglary would also be proved as an aggravating factor. S.H.A. ch. 38, ¶ 9–1(d), par. 2, C; U.S.C.A. Const.Amends. 5, 14.

31. Criminal Law ⇐720(9)

Prosecutor's closing argument at guilt phase that no insanity defense existed as a matter of law and that intoxication defense was a false defense or a lie was a proper comment upon evidence and was not prejudicial as predisposing jury to reject evidence of extreme mental or emotional disturbance at sentencing phase. S.H.A. ch. 38, ¶ 9–1(d), par. 2, C; U.S.C.A. Const. Amends. 5, 14.

32. Criminal Law ⇐796

Instruction on death penalty included the two relevant statutory mitigating factors and also provided that mitigating factors were not limited to those listed, but that the jury should consider any other mitigating factors present in the case and was not erroneous as precluding jury from considering as a mitigating factor any aspect of defendant's character or record and any of the circumstances of the offense that defendant proffered as a basis for a sentence less than death. S.H.A. ch. 38, ¶ 9–1(d), par. 2, C; U.S.C.A. Const.Amends. 5, 14.

33. Criminal Law ⇐796

Instruction that sentencing jury consider any mitigating factors which were relevant to imposition of death penalty was sufficient to satisfy the constitutional provision that the trial court instruct the jury to consider potential of defendant to be restored to useful citizenship. S.H.A. ch. 38, ¶ 9–1(c); S.H.A. Const. Art. 1, § 11.

34. Criminal Law ⇐1122(1)

Record served to establish, contrary to defendant's contention, that the jury was instructed to consider all mitigating factors which were relevant to the imposition of the death penalty, not just statutory mitigating factors. S.H.A. ch. 38, ¶ 9–1(d), par. 2, C; U.S.C.A. Const.Amends. 5, 14.

35. Criminal Law ⇐1208(1)

A unanimous jury or the court must weigh mitigating factors against aggravating factors and must conclude that there are no mitigating factors sufficient to preclude imposition of the death sentence; it is not a question of the state proving an issue beyond a reasonable doubt, but is simply a weighing process. S.H.A. ch. 38, ¶ 9–1(c, e, g, h).

36. Criminal Law ⇐796

The prosecution did not have burden of proving beyond a reasonable doubt that no mitigating factors precluding imposition of death penalty were present and, hence, no instruction to that effect was required. S.H.A. ch. 38, ¶ 9–1(c, e, g, h).

37. Criminal Law ⇐986.6(3)

The only finding necessary in determining admissibility of evidence at the aggravation/mitigation phase is that the evidence be relevant; the rules of evidence are suspended at this stage so that judge or jury as sentencing authority may have all relevant evidence before it. S.H.A. ch. 38, ¶ 9–1(c, e, g, h).

38. Criminal Law ⇐986.6(3)

Testimony of police officer with respect to observing defendant driving a pickup truck slowly past residences and commercial establishments in area of crimes at time they were committed was admissible during aggravation/mitigation phase as relevant to determination of proper sentence in that it bore upon likelihood or unlikelihood that defendant would commit other offenses, appeared trustworthy, was solicited after affording defendant an opportunity to cross-examine officer, and was not challenged as to accuracy. S.H.A. ch. 38, ¶ 9–1(c, e, g, h).

39. Criminal Law ⇐1042

Where defendant did not object to admissibility of probation officer's testimony, but only to admissibility of presentence report itself, which was not admitted in evidence, and defendant requested that presentence investigation report be made over State's objection, failure to object to admission of that evidence operated as a waiver of his right to have the Supreme Court consider the question on appeal.

40. Criminal Law ⇐1208(1)

Sentencing body's discretion, under statute requiring the judge or jury to first determine whether the state has proved a statutory aggravating factor beyond a reasonable doubt before it proceeds to weigh aggravating and mitigating factors and to make its decision whether or not to sentence the defendant to death, is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. S.H.A. ch. 38, ¶ 9–1(g, h).

41. Criminal Law ⇐1208(1)

Determining whether death sentence is proper in particular case requires consideration of character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. S.H.A. ch. 38, ¶ 9–1(g, h).

42. Criminal Law ⇐1206(2)

A death sentence does not offend the proportionality requirement if it is commensurate with the seriousness of the crimes and gives adequate consideration to any relevant mitigating circumstances, including the rehabilitative potential of the defendant. S.H.A. ch. 38, ¶ 9–1(g, h).

43. Criminal Law ⇐1208(1)

Arbitrary or capricious death sentences must be avoided by adequately defining capital crimes, by directing sentencing discretion, and by providing adequate judicial review. S.H.A. ch. 38, ¶ 9–1(g, h).

44. Homicide ⇐354
Rape ⇐64

Penalty of death imposed on conviction of murder and attempted rape was justified by statutory aggravating circumstances and was neither arbitrary nor capricious. S.H.A. ch. 38, ¶ 9–1(g, h).

Mary Robinson, Deputy State Appellate Defender and Paul J. Glaser and Kyle Wesendorf, Asst. State Appellate Defenders, Elgin, for appellant.

J. Michael Fitzsimmons, State's Atty., Wheaton (Thomas L. Knight, Chief, Crim. Div. and Barbara A. Preiner, Asst. State's Attys., Wheaton, of counsel), and Daniel E. May, Villa Park, for the People.

RYAN, Chief Justice:

James Free was indicted in the circuit court of Du Page County for the murder (Ill.Rev.Stat.1977, ch. 38, par. 9–1) and attempted rape of Bonnie Serpico (Ill.Rev. Stat.1977, ch. 38, par. 8–4) and for the attempted murder and attempted rape of Lori Rowe. At the conclusion of the trial, the jury returned verdicts of guilty on all counts. The prosecutor requested a hearing to determine whether the death penalty should be imposed. (Ill.Rev.Stat.1977, ch. 38, par. 9–1(d).) The jury found unanimously beyond a reasonable doubt that the victim was murdered in the course of a burglary and a rape, both of which are aggravating factors supporting the imposition of the death penalty. (Ill.Rev.Stat. 1977, ch. 38, par. 9–1(b)(6)(c).) The jury also found no mitigating factors existed to preclude the imposition of the death penalty. (Ill.Rev.Stat.1977, ch. 38, pars. 9–1(c), (g).) The trial judge entered judgment sentencing the defendant to death. The defendant was also sentenced on the other counts of attempted murder and attempted rape. The death sentence was stayed (73 Ill.2d R. 609(a)), pending direct appeal to this court, pursuant to Rule 603 (73 Ill.2d R.

603). For the reasons expressed in this opinion, we affirm the convictions and the sentences.

The circumstances of the crimes were testified to by Lori Rowe. The defendant testified but claimed not to have any actual recollection of the circumstances surrounding his criminal acts.

Lori Rowe began work shortly before midnight on April 24, 1978, at the M-2 Service Center, an all-night keypunch business. It is located in a large office complex known as the Glen Hill Office Complex in Glen Ellyn, Illinois. Shortly before 4 a.m., while Lori Rowe was sitting at her desk, she saw a stranger, later identified by her as the defendant, standing just inside the door. Bonnie Serpico, the only other employee present, was in a back room. The defendant held a gun in his left hand and a cloth bag in the other.

As Lori Rowe approached the defendant, Bonnie Serpico came out of the back room. The defendant ordered both women into the back room. He forced them, at gunpoint, into the lunchroom and ordered them to lie down on their stomachs, which they eventually did.

The women asked him what he was there for and if he wanted their money. The defendant stated that he did not want their money, but that they should take off their clothes because he wanted to rape them. Rowe started to cry, and Serpico tried to persuade the defendant to take their money and leave the office. The defendant again stated that he did not want their money and turned toward Rowe, telling her to remove her clothes. Serpico continued trying to reason with the defendant, but he stated, "I've done this before." As he made that statement, he moved toward Rowe and took some twine out of the cloth bag he was carrying. He told her to put her hands behind her back.

After securely tying Rowe, the defendant took Serpico into the other room. As they were going into the other room, Serpico looked in his bag and commented "you came prepared for this." The defendant replied, "Yes, I've all sorts of stuff in there."

After Serpico and the defendant went into the next room, Rowe began struggling to get loose. She heard Serpico say that she had her clothes off and the defendant responded "get on your stomach, put your hands behind your back. I want to tie your hands." Serpico urged the defendant not to tie her hands, pointing out that she had not resisted the defendant.

In the meantime, Rowe managed to get her shoes off and was attempting to get the rope off her feet. The defendant came into the room to check on Rowe, and he saw that Rowe had loosened the rope. He became angry and yanked the rope, pulling her sideways until she fell onto her side.

While lying on her side, Rowe heard Serpico get up and run. The defendant started running after her. Seconds later Rowe heard a gunshot. The defendant then ran back into the room where Rowe was lying. Rowe was sitting up now and the defendant pointed his gun at her and she cried "oh no." As she lowered her shoulder and turned away from the defendant, he shot her and ran from the building.

With her hands still tied behind her back, Rowe managed to crawl out to the main office area where Serpico lay dead. Rowe was able to pull the telephone off a desk and contact the police. She remained there until the police arrived about 15 minutes later.

An autopsy revealed that the cause of Serpico's death was exsanguination, or severe loss of blood, related to a gunshot wound.

Through a police investigation, suspicion focused on the defendant, who was arrested early the next morning, April 25, 1978, in a house owned by his father in Dubuque, Iowa. He was charged with one count of murder and attempted rape against Bonnie Serpico and one count of attempted murder and attempted rape against Lori Rowe.

The jury found the defendant guilty on all counts. At a sentencing hearing on the murder conviction, as noted, the jury found

that Bonnie Serpico was killed in the course of a rape and a burglary and that no mitigating factors existed sufficient to preclude imposition of the death sentence. The trial judge entered a judgment sentencing the defendant to death. At a later sentencing hearing, on the other convictions, the court sentenced the defendant to serve two concurrent 15-year prison terms for the two counts of attempted rape and a consecutive 30-year sentence for the attempted murder.

The defendant has raised some 16 issues to be resolved on this appeal. Other facts relevant to their resolution will be set forth with the discussion of each particular issue. Several issues raised in this case have been resolved in prior opinions of this court and will not be further discussed in this opinion. The defendant challenges the constitutionality of our death penalty statute, which was resolved in *People ex rel. Carey v. Cousins* (1979), 77 Ill.2d 531, 34 Ill.Dec. 137, 397 N.E.2d 809. The defendant argues that our statute does not include attempt (here, attempted rape) in the list of aggravating factors which trigger eligibility for the death penalty. That issue was resolved against the defendant in *People v. Walker* (1982), 91 Ill.2d 502, 64 Ill.Dec. 531, 440 N.E.2d 83. Defendant argues that the trial court erred when it held it has no power or discretion to disregard a jury's verdict in a death penalty proceeding and must enter judgment on that verdict. That was resolved, contrary to defendant's position, in *People v. Lewis* (1981), 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346, and *People v. Gaines* (1981), 88 Ill.2d 342, 58 Ill.Dec. 795, 430 N.E.2d 1046. Also previously rejected were the contentions that the appellate review procedure provided by our statute is inadequate (*People v. Brownell* (1980), 79 Ill.2d 508, 541–44, 38 Ill.Dec. 757, 404 N.E.2d 181; *People v. Gaines* (1981), 88 Ill.2d 342, 383, 58 Ill.Dec. 795, 430 N.E.2d 1046; *People v. Lewis* (1981), 88 Ill.2d 129, 146–47, 58 Ill.Dec. 895, 430 N.E.2d 1346), and that defendants sentenced to death are denied relief under the Post-Conviction Hearing Act (Ill.Rev.Stat.1977, ch. 38, par. 122–1 *et seq.*), in violation of their constitutional rights. *People v. Gaines* (1981), 88 Ill.2d 342, 384–86, 58 Ill.Dec. 795, 430 N.E.2d 1046.

As to the issues to be decided in this case, we first consider whether a motion to suppress certain physical evidence should have been granted.

Through police investigation it was learned that the alleged assailant was James Free, a former employee of the Glen Hill Office Complex. On Sunday, April 23, 1978, another incident involving the defendant occurred. It was reported by several women working at the office complex that a man, later identified by them as the defendant, came into their office. The women questioned him, and he said that he had come to clean the carpet. He walked through the office and then left.

Two of the women, Julie Kelly and Mary Ferrier, went down to the basement to a vending machine. They saw the defendant walk past the doorway. When they went back into the hallway, they observed him staring at them through a window. They ran back to their office and later received a phone call from a person with a male voice. The caller described the women who had been in the basement and stated that they had left change in the vending machine. He suggested they come down to get their change. The women knew they had not left any change and refused to go down to the basement. They then saw the defendant riding around the parking lot of the office complex in a red Ford pickup truck.

The police talked with the manager of the Glen Hill Office Complex, and he stated that the description of the offender and the vehicle driven by the offender matched that of James Free, a former employee of the construction company that built the complex and of the complex itself. He was later identified in a photo lineup by Lori Rowe as her assailant. Further information led the police to believe that the defendant was residing at his parents' townhouse in Dubuque, Iowa, on leave for 30 days from the army.

On April 25, 1978, Detective Velon and two other Glen Ellyn, Illinois, police officers

accompanied Iowa officers to the Free townhouse in Dubuque. The police had an arrest warrant for James Free for murder and attempted murder. Emergency equipment, including fire equipment and an ambulance, were stationed in the vicinity.

The police officers, using a public address system, made repeated attempts to call the defendant from the house for about 30 minutes. After that time, and after seeing someone at both the front and back windows, a tear gas canister was fired into the second-floor window. The defendant came out of the house and was ordered to lie on the ground with his hands out in front of him. Other officers were ordered to watch the house in the event that someone else was still in there. While lying on the ground, the defendant was handcuffed.

The defendant, at this time, was asked where his gun was and whether anyone was in the house. He replied that his gun was in the basement and that no one was in the house. No other questions were asked of the defendant. The defendant was then taken to the Dubuque police department. Only a short period of time elapsed between the time the defendant came out of the house and the time he was placed in the squad car. No threats were made, and no physical contact ensued, although it is indicated that officers had guns pointed at him during this period.

After the defendant was in custody, several officers attempted to enter the house. Captain Egan of the Dubuque police department entered and proceeded to the second floor "to make certain there was no one else present in the building and to make certain that the tear gas projectile did not hit someone or start a fire." On his first two entries, Captain Egan was forced out of the house by the tear gas. On his third trip to the second floor, Egan retrieved the tear gas canister.

Officer Kisting and Detective Velon attempted to check the first-floor area to determine if anyone else was present in the building. During this entry, Velon observed brown twine "in a garbage bag, on the very top of that bag, fully exposed * *." He testified that the twine was similar to the twine that he knew had been used to tie the hands of Lori Rowe. He also testified that he was not looking for the twine when he entered the premises and did not seize the twine during this search.

Officer Kisting and Detective Velon also went to the basement. Their search of the first floor and the basement lasted about 45 seconds. Captain Egan testified that all three of his attempts to search the second floor lasted about two minutes.

All three officers testified that they did not look into any drawers, cabinets or closets during their search. The only item seized was the tear gas canister, which had left a scorch mark on the floor of the bedroom where it landed.

The officers left the scene and obtained a search warrant through an Iowa magistrate. They returned to search the house and seized a gun, boxes of ammunition, clothing, the brown twine, a gym bag, reloading equipment, plastic earmuffs, and a towel. Photographs were also taken of the scene.

The defendant filed a motion to suppress the physical evidence because the granting of the search warrant was based upon the defendant's involuntary statement made following his arrest and information gained during allegedly unlawful entries into the house after he was arrested. The defendant also filed several motions to suppress certain statements, which motions are not before us on this appeal.

The trial court denied the motion to suppress the physical evidence after a lengthy evidentiary hearing. The court found that the entries into the house were not unlawful searches and that the statement made by the defendant that his gun was in the basement at the time of his arrest was involuntary, but not in violation of his *Miranda* rights. The court held that although the statement could not be used as evidence, it was properly used in the affidavit for a search warrant. The court also found that even excluding the "gun statement" and information gained in the prior entries

and searches of the house, the affidavit and oral testimony given to the issuing magistrate constituted probable cause for the issuance of the warrant.

On appeal, the defendant again argues that the search warrant was invalid because it was based on information gathered at an allegedly prior illegal entry and on the allegedly involuntary statement made by the defendant. He also argues that because the warrant is invalid, all the evidence seized pursuant to the warrant must be suppressed.

[1] We hold that the prior entries into the house were reasonable, necessary and cursory searches under the exigencies of defendant's arrest. The entries were also justified as valid "protective sweeps." While lawfully on the premises, Detective Velon observed the twine which was in plain view. This information was therefore properly included in the search warrant affidavit and relied upon by the magistrate. The information concerning the twine, plus other information presented to the magistrate, all of which will be discussed later, established probable cause to issue the warrant, even without consideration of the defendant's allegedly involuntary statement. Therefore, we need not decide whether the statement could properly be considered in support of the search warrant.

[2-4] The guiding principle is reasonableness in fourth amendment searches and seizures. (*United States v. Chadwick* (1977), 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538, 547.) In determining whether law-enforcement officials acted reasonably in a given case, courts should judge the circumstances as known to the officials at the time they acted. (*People v. Clay* (1973), 55 Ill.2d 501, 504, 304 N.E.2d 280.) It must be remembered "that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." (*Michigan v. Tyler* (1978), 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486, 498.) Warrantless searches are permissible where exigent circumstances are present. Since exigent circumstances authorize warrantless entries for purposes of searching, certainly circumstances may exist which authorize warrantless entries for less intrusive purposes.

We believe that circumstances existed here which justified the warrantless entry into the house. In fact, the police had an obligation to enter the premises, retrieve the tear gas canister, air out the house, check for fire, and determine whether there were persons present who either were in danger or posed a substantial danger to the police. (See 2 W. LaFave, Search and Seizure secs. 6.4(c), 6.6 (1978).) In *People v. Connolly* (1973), 55 Ill.2d 421, 303 N.E.2d 409, the police surrounded a two-story building, and efforts to persuade the defendant to surrender had failed. Tear gas canisters were fired into the building, and a fire started on the second floor. Defendant was arrested as he descended the stairs from the second floor. A fireman entered the building and was overcome by smoke. A police officer then entered the apartment attempting to assist the fireman, "as well as attempting to locate other persons possibly still in the gas-filled house." (*People v. Connolly* (1973), 55 Ill.2d 421, 427, 303 N.E.2d 409.) The officer observed a fur coat and two revolvers on top of a garbage can. He seized the evidence.

The court in *Connolly* held that the trial court properly denied the defendant's motion to suppress. The court stated that the officer was in the building to help a fireman, as well as to ascertain if any persons were in the building. The items seized were known by the officer to be similar to those used in the commission of a crime, and they were in plain view. *People v. Connolly* (1973), 55 Ill.2d 421, 427, 303 N.E.2d 409.

[5] A substantially similar situation existed in our case. The officers entered the house to make certain there was no one in the house who was either a danger to the police or in danger himself. Also, the officers were concerned about the fire hazard presented by the tear gas canister, which did, in fact, scorch the floor. It was not

necessary to wait until a fire started before the officers could enter to retrieve the tear gas canister as the defendant would apparently require.

[6] The entry and search to determine if anyone is in the house who may pose a danger to the police is often referred to as a "protective sweep." Professor LaFave states:

"In some situations, the 'potentiality for danger surrounding the arrest' may be so high that entry of premises to make a 'protective sweep' will be permissible even though the arrest itself was achieved without entry. Typically, the reason no entry was made to arrest is because the police perceived the situation as a very dangerous one and thus took steps to cause the prospective arrestee to exit the premises and submit to arrest outside. Even with that person now in custody, the police may have good reason to doubt whether they can withdraw from the area with their prisoner without being fired upon, in which case an entry and 'protective sweep' is justified. Such entries have been upheld when a weapon used in a recent crime by the arrestee or a weapon used by someone in firing at the police from those premises is as yet unaccounted for, and also when police have information the defendant was travelling with armed associates or that the defendant was armed and accompanied by another." 2 W. LaFave sec. 6.4(c), at 431 (1978).

The officers' entry into the house falls within the above rule. The officers knew that defendant had used a gun in the commission of the crimes. His brother-in-law had told the police that the defendant carried a handgun in his truck. When the defendant was captured, he did not have the gun. Although there was no evidence that the defendant had an accomplice in the commission of the crimes, one officer testified that he saw someone at both the front and back windows of the house before the defendant came out, and he could not be sure if both were the same person. Thus, the officers had knowledge that a violent crime had been committed, that the gun used had not been recovered, and that someone was possibly in the house who would have access to the weapon. There was a potentiality for danger surrounding the arrest which justified the "protective sweep" of the house. (See *McGeehan v. Wainwright* (5th Cir.1976), 526 F.2d 397.) A serious and demonstrable potential for danger clearly existed here. (See *United States v. Kinney* (6th Cir.1981), 638 F.2d 941; *United States v. Smith* (5th Cir.1975), 515 F.2d 1028, 1031.) The officers did not enter the house for the purpose of conducting a search except for the limited purposes indicated. Only this limited search was made while in the house, and nothing except the tear gas canister was seized. Even the brown twine, which one officer observed while in the house, was not taken, although it resembled twine which had been used to bind the victims.

[7] At the hearing on the motion to suppress, the trial court was shown a videotape of the entire arrest scene. Although defendant argues that the videotape demonstrates that the officers did not feel that they were in danger, the court was of the opinion that the videotape and other evidence showed that an exigency existed. The court stated, "Having viewed the videotape and having considered the testimony in my opinion there was a sufficient exigency to have warranted these entrances by the officers." The trial court found that the entrances were reasonable for the reasons stated by the officers and justified under the exigencies of the arrest. Detective Velon was properly in the house, and his observation of the twine in plain view was properly used in the affidavit for the search warrant. See *People v. Connolly* (1973), 55 Ill.2d 421, 427, 303 N.E.2d 409; *People v. Bombacino* (1972), 51 Ill.2d 17, 280 N.E.2d 697.

The defendant also argues that to find probable cause the Iowa magistrate relied on Detective Velon's observation of the twine made during an illegal search and the defendant's involuntary statement made at the time of his arrest and that, therefore,

the warrant was invalid. The defendant argues that any unlawfully obtained information used to secure a search warrant invalidates that warrant and the subsequent search is a fruit of the poisonous tree, even if probable cause can be found without the illegal information.

[8] As we have already stated, Detective Velon's entry into the house was legal, and his observation of the twine in plain view was properly included in the affidavit for the search warrant. The only remaining allegedly unlawfully obtained information used to secure the search warrant was the statement made by the defendant at the time of his arrest, which the trial court, while suppressing its use as evidence, permitted to be used in the affidavit for the search warrant. We need not decide whether it was properly included in the affidavit for "[i]f the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admitted." *James v. United States* (D.C. Cir.1969), 418 F.2d 1150, 1152; *United States v. Marchand* (2d Cir.1977), 564 F.2d 983, 1002; *United States v. Koonce* (8th Cir.1973), 485 F.2d 374, 379; see also 3 W. LaFave, Search and Seizure sec. 11.4(f), at 649–50 (1978).

The magistrate who issued the warrant had before him the affidavits of two police officers and the oral testimony of one of the officers. He was informed that the officers had an arrest warrant for defendant which indicated there was probable cause to believe defendant had committed the crimes with which he was charged. The magistrate knew that the defendant had been arrested after he was forced from the house, for which a search warrant was sought, and that the weapon used in the commission of the crimes was not recovered. The magistrate was also informed concerning the brown twine which an officer saw while lawfully in the house. It was described to the magistrate as the same color, size and texture as that used to tie the victims. The affidavits also stated that the defendant's brother-in-law, a police officer employed by the Wheaton, Illinois police department, told the affiants that on April 22 or 23 defendant had in his possession bullets of the same caliber used on the victims and that the defendant carried a handgun in his truck capable of firing the bullets that were taken from the victims' bodies. The magistrate was also informed that the assailant had in his possession a cloth bag in which he carried the twine and that his face had been covered with a terry-cloth towel which was tied with brown twine. An officer testified before the magistrate that a military button had been found at the scene of the crime and that defendant was, at that time, a member of the United States Army. The property listed in the search warrant consisted of the gun, bullets, brown twine, towel, white laundry bag, multicolored plaid shirt (assailant had been described as wearing a multicolored plaid shirt) and clothing with military-type buttons, with a button missing. With the exception of this last item, there was testimony that the assailant had all of these items in his possession when the crimes were committed. The defendant had returned to the house, for which the search warrant was sought, the same day the crimes were committed, had slept there overnight, and had been forced from the building the next morning by the use of tear gas and did not have the items listed in the search warrant in his possession when he came from the house.

[9, 10] Whether or not probable cause exists in a particular case depends upon the totality of the circumstances and facts known to the officers and court when the warrant is applied for. In deciding the question of probable cause the courts are not disposed to be unduly technical. Rather, the probabilities considered are the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act. *Draper v. United States* (1959), 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327; *People v. Clay* (1973), 55 Ill.2d 501, 505, 304 N.E.2d 280.

[11, 12] Probable cause means simply that the facts and circumstances within the knowledge of the affiant were sufficient to warrant a man of reasonable caution to believe that the law was violated and evidence of it is on the premises to be searched. It is not required that the complaint or affidavits show beyond a reasonable doubt that the warrant should be issued. (See *People v. Fiorito* (1960), 19 Ill.2d 246, 257, 166 N.E.2d 606; *People v. Francisco* (1970), 44 Ill.2d 373, 376, 255 N.E.2d 413.) In our case, even if we exclude defendant's allegedly involuntary statement that the gun was in the basement of the house, the information before the magistrate was sufficient to establish probable cause for the issuance of the search warrant. The court held extensive hearings and made findings of fact. The trial court's determination of factual matters in a hearing on a motion to suppress will not be disturbed unless manifestly erroneous. (*People v. Conner* (1979), 78 Ill.2d 525, 532, 36 Ill.Dec. 672, 401 N.E.2d 513; *People v. Williams* (1974), 57 Ill.2d 239, 246, 311 N.E.2d 681; *People v. Clay* (1973), 55 Ill.2d 501, 505, 304 N.E.2d 280.) We conclude that the trial court's determination, even excluding consideration of the involuntary statement, was not manifestly erroneous.

[13] The defendant next contends that he was denied a fair trial because the jury was selected in compliance with *Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, resulting in a conviction-prone jury. We need not address that issue here because we held in *People v. Lewis* (1981), 88 Ill.2d 129, 147, 58 Ill.Dec. 895, 430 N.E.2d 1346, that a jury qualified in compliance with *Witherspoon* does not affect the validity of the conviction.

The defendant also contends that certain studies demonstrate that a venire qualified in compliance with *Witherspoon* results in a jury not only conviction prone, but also unwilling to accept an insanity defense. We need not address that issue because, as will be discussed later, this defendant did not present an insanity defense and was not entitled to an insanity-defense instruction.

[14, 15] The defendant makes the further objection that the exclusion of veniremen solely on the basis of their refusal to follow the death penalty law denies the defendant his right to a jury representative of a cross-section of the community in violation of his sixth and fourteenth amendment rights. (*Cf. Taylor v. Louisiana* (1975), 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690.) This contention was specifically rejected in *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, and we reject it also. In *Lockett* the court stated:

> "Nor was there any violation of the principles of *Taylor v. Louisiana, supra.* In *Taylor,* the Court invalidated a jury selection system that operated to exclude a 'grossly disproportionate' [citation] number of women from jury service thereby depriving the petitioner of a jury chosen from a 'fair cross-section' of the community [citation]. Nothing in *Taylor,* however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." (*Lockett v. Ohio* (1978), 438 U.S. 586, 596–97, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973, 984–85.)

(See *Spinkellink v. Wainwright* (5th Cir. 1978), 578 F.2d 582.) The right to trial by jury or the right to a representative jury does not include the right to be tried by jurors who have stated that they will refuse to follow the law.

We have previously rejected the contention that a juror who states that he would be able to decide the issue of guilt impartially should be permitted to pass on that issue notwithstanding his inability to vote for the death penalty. (*People v. Gaines* (1981), 88 Ill.2d 342, 357, 58 Ill.Dec. 795, 430 N.E.2d 1046.) In *People v. Lewis* (1981), 88 Ill.2d 129, 146–47, 58 Ill.Dec. 895, 430 N.E.2d 1346, we also rejected the argument that the mere conviction of a defendant by a jury establishes "good cause" under section 9–1(d)(2)(C) (Ill.Rev.Stat.1977, ch. 38, par. 9–1(d)(2)(C)) to excuse the convicting

jury and to impanel another jury for sentencing purposes. *People v. Lewis* (1981), 88 Ill.2d 129, 146–47, 58 Ill.Dec. 895, 430 N.E.2d 1346.

The defendant states that of the four veniremen excused for cause, over defense objection, only one stated that he would automatically vote against the death penalty, while the answers of the other three jurors were "equivocal." The defendant's characterization of the potential jurors' answers results from his focus on a single question and answer in isolation from others. (*People v. Gaines* (1981), 88 Ill.2d 342, 352, 58 Ill.Dec. 795, 430 N.E.2d 1046.) The defendant also focuses on the answers given to general questions instead of the answers given to specific questions dealing with the willingness or unwillingness of a potential juror to follow the death penalty law. Our examination of the record satisfies us that the standards of *Witherspoon* are clearly met. The record unambiguously establishes that each of these veniremen would not impose the penalty of death regardless of the evidence. They have not stated that they have only general religious or moral objections to the death penalty, but have made it unmistakably clear that they would automatically vote against the death penalty without regard to the evidence or the law. In considering any inconsistencies in the answers given by a venireman, we recognize the superior position of the trial judge to ascertain the meaning which the one being questioned intends to convey. *People v. Gaines* (1981), 88 Ill.2d 342, 357, 58 Ill.Dec. 795, 430 N.E.2d 1046.

The defendant next claims that the trial court erred in ruling that toxic psychosis is not an insanity defense under section 6–2 of the Criminal Code of 1961 (Ill.Rev.Stat. 1977, ch. 38, par. 6–2). The defendant's position is that the trial court should have instructed the jury on toxic psychosis as a form of mental disease or defect under section 6–2 and also instructed the jury on the defense of voluntary intoxication. (Ill.Rev. Stat.1977, ch. 38, par. 6–3.) The defendant also claims that the trial court misled him into believing that he would instruct the jury on insanity by allowing the defendant's expert witnesses to testify, thereby denying him a fair trial.

The State argues that toxic psychosis, under the facts of this case, is not a mental disease or defect in the legal sense. The State argues that the voluntary-intoxication or drugged-condition provision of section 6–3 of the Criminal Code of 1961 (Ill. Rev.Stat.1977, ch. 38, par. 6–3) should be read to qualify or limit the legal meaning of the term "mental disease or mental defect" in section 6–2, so that a "mental disease or mental defect" does not include a condition which might otherwise qualify as a mental disorder from a medical viewpoint when that condition is attributable solely to voluntary intoxication on alcohol or drugs or both. The State also contends that the trial court did not mislead the defendant.

The defendant testified that on the night of April 23, 1978, and into the morning of April 24, 1978, he had consumed a few beers, a marijuana cigarette and a "mint leaf or, as it's called, dust." The mint leaf was soaked in a PCP or phencyclidine compound and dried. The defendant testified that he had used PCP on only three prior occasions. The defendant testified that he had no actual recollection of what he had done between 12:30 a.m. and 5:30 a.m. on April 24, 1978. The crimes occurred at approximately 4 a.m. on April 24.

The defendant also testified that his "recollection" of the incident and the information he gave his expert witnesses was from "bits and pieces of dreams." The dreams started about one month after he was incarcerated. The defendant also indicated that his "recollection" of the incident was taken from reports and interviews from his attorney that the defendant had read.

The defendant had three expert witnesses testify in his behalf. Doctor Lyle Rossitter, a psychiatrist, testified that the defendant was suffering from a mental disease; namely, "a toxic psychosis, secondary to some sort of chemical or drug intoxication," which is listed as a mental disease in the Diagnostic and Statistical Manual of Mental Disorders (2d ed. 1968), published by the

American Psychiatric Association. Doctor Rossitter's opinion was that the defendant could not appreciate the criminality of his acts or conform his conduct to the requirements of the law.

Doctor Rossitter, however, indicated that he had several reservations about his diagnosis and opinion. He testified that the defendant was not sure what substance he had ingested and that would affect his opinion. Secondly, the defendant's previous experiences with PCP were peaceful, calm experiences, whereas the experience in issue was violent and fearful. His third reservation was the source of the defendant's information. The doctor refused to accept the defendant's reconstruction through "bits and pieces of dreams" as an accurate representation of what the defendant actually experienced at the time of the offense. He also testified that such dream reconstruction, when the events are beyond recall due to amnesia, is not an acceptable method to arrive at a diagnosis or opinion in psychiatry. His diagnosis and opinion were, therefore, contingent upon accepting the defendant's reconstruction of the events through his dreams, even though the doctor himself could not accept such a reconstruction and psychiatry, generally speaking, does not use dreams to reconstruct events.

On cross-examination, Doctor Rossitter testified, in response to a hypothetical question based on Lori Rowe's testimony concerning the events, that the defendant was capable of acting intentionally and that, within a reasonable degree of medical and psychiatric certainty, no mental disease or defect existed, even though the defendant had used PCP and drank a few beers.

Doctor Wayne Tuteur, a psychiatrist, testified in response to a hypothetical question based on defendant's reconstruction of the events, that the hypothetical man was suffering from a mental disease called psychosis with drug intoxication. The doctor also testified that the hypothetical man lacked substantial capacity to either appreciate the criminality of his conduct or conform his conduct to the law. On cross-examination the doctor testified that he had never done any research in the area of PCP.

Doctor Frank Fiorese, a toxicologist, testified as to the physiological and psychological effects of PCP. He stated that certain amounts of PCP could cause nystagmus, slurred speech, blurred vision, and trembling muscles. The possible psychological effects include amnesia, excitement, anxiety, hallucination, and drowsiness.

[16] The trial court ruled that toxic psychosis prompted by the voluntary ingestion of alcohol and drugs does not constitute a mental disease or defect warranting an instruction under section 6–2. We agree.

The insanity defense is defined in section 6–2 as follows:

"(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." (Ill.Rev.Stat. 1977, ch. 38, par. 6–2.)

Section 6–3, in relevant part, provides:

"A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either:

(a) Negatives the existence of a mental state which is an element of the offense." Ill.Rev.Stat.1977, ch. 38, par. 6–3.

[17] The rule that a defendant who is legally insane will be relieved of criminal liability must be reconciled with the generally accepted rule that a defendant who is voluntarily under the influence of intoxicants at the time of the crime will not be relieved of criminal responsibility. The essential consideration is not whether the medical profession characterizes the defendant's use of intoxicants resulting in a psychosis as a mental disease or defect, but rather whether society should relieve from criminal responsibility a defendant who voluntarily ingests such intoxicants and then commits criminal acts. It is obvious to us that an actor should not be insulated from criminal responsibility for acts which result from a temporary mental state that is voluntarily self-induced.

We therefore hold that toxic psychosis induced by voluntary intoxication on drugs, alcohol or both is not a "mental disease or mental defect" which amounts to legal insanity under our statute. In *Upstone v. People* (1883), 109 Ill. 169, 175, the court stated, "The question in the case was, whether there was but a temporary insanity, produced immediately by intoxication, or fixed insanity. If it was the former, it furnishes no excuse." We hold the same is true under our present statute and find that a majority of jurisdictions agree. (*State v. Ingram* (Mo.1980), 607 S.W.2d 438; *Jackson v. State* (1980), Ind., 402 N.E.2d 947; *State v. Berge* (1980), 25 Wash.App. 433, 607 P.2d 1247; *O'Leary v. State* (Alaska 1979), 604 P.2d 1099; *Jackson v. State* (1979), 149 Ga.App. 253, 253 S.E.2d 874; *Commonwealth v. Hicks* (1979), 483 Pa. 305, 396 A.2d 1183; *Commonwealth v. Sheehan* (1978), 376 Mass. 765, 383 N.E.2d 1115; *State v. Kolisnitschenko* (1978), 84 Wis.2d 492, 267 N.W.2d 321; *State v. Toth* (1977), 52 Ohio St.2d 206, 6 O.O.3d 461, 371 N.E.2d 831; *State v. James* (1977), 223 Kan. 107, 574 P.2d 181; *State v. Clarken* (Minn.1977), 260 N.W.2d 463; *Barrett v. United States* (D.C.App.1977), 377 A.2d 62; *State v. Plummer* (1977), 117 N.H. 320, 374 A.2d 431; *State v. Fox* (1975), 112 Ariz. 375, 542 P.2d 800; *State v. Hall* (Iowa 1974), 214 N.W.2d 205; *People v. Kelly* (1973), 10 Cal.3d 565, 516 P.2d 875, 111 Cal.Rptr. 171; *Demouchette v. State* (Tex.Cr.App.1973), 502 S.W.2d 712; *State v. Linn* (1969), 93 Idaho 430, 462 P.2d 729; *Cirack v. State* (Fla. 1967), 201 So.2d 706; see also *United States v. Shuckahosee* (10th Cir.1979), 609 F.2d 1351; *Springer v. Collins* (4th Cir.1978), 586 F.2d 329; *United States v. Burnim* (9th Cir.1978), 576 F.2d 236; *United States v. Romano* (5th Cir.1973), 482 F.2d 1183; *United States v. Jewett* (8th Cir.1971), 438 F.2d 495; *United States v. Currier* (2d Cir.1969), 405 F.2d 1039; Annot., *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236 (1966); Annot., *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R.3d 98 (1976).

[18] Simply stated, a voluntary intoxication or a voluntary drugged condition does not raise the defense of insanity, but is governed by section 6–3 and may be used to negate the existence of the mental state which is an element of the crime. (Ill.Rev. Stat.1977, ch. 38, par. 6–3.) A voluntary intoxication or a voluntary drugged condition precludes the use of the insanity defense *unless* the mental disease or defect is traceable to the habitual or chronic use of drugs or alcohol (*State v. Toth* (1977), 52 Ohio St.2d 206, 6 O.O.3d 461, 371 N.E.2d 831) and such use results in a "settled" or "fixed" permanent type of insanity. (*People v. Cochran* (1924), 313 Ill. 508, 145 N.E. 207; *Upstone v. People* (1883), 109 Ill. 169; *People v. Jones* (1977), 56 Ill.App.3d 600, 14 Ill.Dec. 97, 371 N.E.2d 1150; *People v. Mask* (1975), 34 Ill.App.3d 668, 339 N.E.2d 417; see *O'Leary v. State* (Alaska 1979), 604 P.2d 1099; *Jackson v. State* (1980), Ind., 402 N.E.2d 947; *State v. Kolisnitschenko* (1978), 84 Wis.2d 492, 267 N.W.2d 321; *State v. James* (1977), 223 Kan. 107, 574 P.2d 181; *Barrett v. United States* (D.C.App.1977), 377 A.2d 62; *People v. Kelly* (1973), 10 Cal.3d 565, 516 P.2d 875, 111 Cal.Rptr. 171; *Cirack v. State* (Fla.1967), 201 So.2d 706.) There is no evidence in the record that this defendant was a habitual or chronic user of drugs or alcohol, or that the claimed disease or defect was "settled" or "fixed."

The defendant relies on *People v. King* (1973), 181 Colo. 439, 510 P.2d 333, and *People v. Kuhn* (1979), 68 Ill.App.3d 59, 24 Ill.Dec. 476, 385 N.E.2d 388. Neither case deals with this particular issue and, therefore, we will not discuss them further.

The trial court properly instructed the jury on the defense of voluntary intoxication and properly refused, as a matter of law, to instruct the jury on the insanity defense. See *United States v. Shuckahosee* (10th Cir.1979), 609 F.2d 1351, 1355; *O'Leary v. State* (Alaska 1979), 604 P.2d 1099, 1103; *State v. Toth* (1977), 52 Ohio St.2d 206, 6 O.O.3d 461, 210, 371 N.E.2d 831, 834.

[19] The defendant also contends that the trial court misled him into believing

that the jury would be instructed on the insanity defense by allowing the defendant's expert witnesses to testify on that issue, thereby denying him a fair trial. The defendant's argument essentially is that the trial court's response to the State's motion to strike the insanity defense implied that the court would instruct the jury on that issue.

We find that the defendant's contention is wholly without merit. The record unequivocally supports the State's position that it attempted to head off any surprise later in trial by making defense counsel fully aware of its objections to the use of the insanity defense in this case before defendant presented any evidence. The trial judge did not either expressly or impliedly rule on the issue at that time. In fact, defense counsel urged that the trial judge not rule on the question until after the expert witnesses testified and the evidence was in.

Again, during the course of the trial, defense counsel was made aware of the prosecution's continuing objections to defendant's evidence on the insanity defense. The court made it clear at that time that it had not ruled that there was or was not sufficient evidence to raise such a defense. We find this issue urged by the defendant to be totally unsubstantiated and a waste of counsel's time and the time of this court; it should not have been raised.

The defendant next objects to the trial court's ruling which allowed a psychologist and psychopharmacologist, Doctor Ronald Siegel, to give opinion testimony on the question of the defendant's ability to act intentionally while under the influence of alcohol and PCP.

The court ruled that the State's expert witness could not testify as to whether the defendant had a mental disease or defect, but that he could testify as to whether the defendant had the ability to act intentionally. The court stated that Doctor Siegel was both a pharmacological expert and a psychological expert and could give his opinion as to the effect of the drug on the defendant as that relates to intoxication only. Thus, this witness' testimony would relate only to the intoxication defense under section 6–3 and not the insanity defense under section 6–2. Defendant's objections to this testimony are that Doctor Siegel was not a qualified "expert" to offer an opinion as to defendant's "intent," that only a psychiatrist could testify in this manner, and that his opinion was on an ultimate issue in the case, thus invading the province of the jury. We do not agree.

Doctor Siegel testified that, in his opinion, the defendant "was not rendered incapable of acting * * * intentionally." His opinion was based on his observations and the examinations that he conducted on the defendant, plus his education, experience and research on PCP. Doctor Siegel also testified that the defendant's conduct was not "consistent with the phenominology of PCP intoxication, or indeed, other types of hallucinogenic intoxications." In response to the State's hypothetical based on Lori Rowe's testimony and the defendant's testimony that he had consumed beer and had smoked marijuana and used PCP, Doctor Siegel stated that the hypothetical man "was not so intoxicated as to render him incapable of acting intentionally at that time."

[20, 21] We note that the burden of establishing the qualifications of an expert witness rests on the proponent of his testimony—in this case, the State. (*People v. Park* (1978), 72 Ill.2d 203, 209, 20 Ill.Dec. 586, 380 N.E.2d 795.) The standard of review in this area is whether the trial court has abused its discretion in permitting this particular "expert" witness to testify. (*People v. Park* (1978), 72 Ill.2d 203, 209, 20 Ill.Dec. 586, 380 N.E.2d 795; *People v. Sawhill* (1921), 299 Ill. 393, 132 N.E. 477.) "[T]he *trial court must be left to determine*, absolutely and without review, the fact of possession of the required qualification by a particular witness." (2 Wigmore, Evidence sec. 561 (Chadbourne rev. ed. 1979).) The trial court did not abuse its discretion in permitting Doctor Siegel to testify.

Doctor Siegel is both a psychologist and psychopharmacologist. A psychopharma-

cologist is one who specializes in the study of the effects of drugs on behavior and usually is trained in psychology, pharmacology, medicine, neurology, chemistry, and related disciplines.

That expert testimony concerning the drug PCP was necessary cannot be contested. The jurors, like most people, had a limited understanding of this drug and, therefore, the knowledge and experience of Doctor Siegel was needed as expert testimony in this area. "The true test of the admissibility of such testimony * * * is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or the jury in determining the questions at issue." (7 Wigmore, Evidence sec. 1923 (Chadbourne rev. ed. 1978); see *Miller v. Pillsbury Co.* (1965), 33 Ill.2d 514, 516, 211 N.E.2d 733.

We believe that Doctor Siegel, in view of his education, qualifications, experience, and extensive research in the area of PCP, was eminently qualified to give his opinion as to whether the defendant had the ability to act intentionally at the time of the crime, as that relates to the defense of voluntary intoxication. The doctor's opinion was based on his education, experience and research in the area of the effects of drugs on humans, plus his examinations of the defendant.

[22] The defendant's reliance on *People v. Noble* (1969), 42 Ill.2d 425, 248 N.E.2d 96 is misplaced. *Noble* dealt with a clinical psychologist diagnosing and giving his opinion on the issue of the defendant's sanity. *Noble* also dealt with a psychiatrist's use of testing done by a psychologist pursuant to that psychiatrist's direction. In *Noble* the court held that the clinical psychologist should have been permitted to testify as to the tests done, the procedure followed and the test results, at least when a psychiatrist has requested such tests. Also, that court held that the trial court should not have restricted the psychiatrist's use of the psychological testing he had ordered to evaluate the defendant. We note that the court indicated that "the trend of the more recent decisions is to permit a properly qualified psychologist to testify as to the nature and results of psychological tests * * *" (42 Ill.2d 425, 433, 248 N.E.2d 96) and "even to the extent of permitting the expression of opinions as to the mental condition of the individual" (42 Ill.2d 425, 434, 248 N.E.2d 96) when a qualified psychologist testifies. (See *People v. Nelson* (1980), 92 Ill.App.3d 35, 47 Ill.Dec. 683, 415 N.E.2d 688; *People v. Whitaker* (1980), 87 Ill.App.3d 563, 43 Ill.Dec. 166, 410 N.E.2d 166.) We also note that the General Assembly enacted a statute permitting a qualified clinical psychologist to testify on a defendant's fitness, insanity or mental illness. (Ill.Rev.Stat.1981, ch. 38, par. 1005-2-5.) However, in this case Doctor Siegel did not testify on the issue of defendant's insanity. The trial court restricted Doctor Siegel's testimony to defendant's intoxication defense.

[23] The defendant next objects to the admission of the testimony of Scott Carlson, a Winfield police officer. Defendant claims that the testimony was irrelevant and implied criminal misconduct on the part of the defendant.

Officer Carlson testified that he stopped a red Ford truck driven by James Free at approximately 4 a.m. on April 23, 1978, in Winfield, Illinois. Carlson observed that the defendant was carrying a knife in a leather case on his left hip. He talked with the defendant for six to seven minutes and released him.

The trial court ruled that the testimony was relevant because it placed the defendant, an out-of-State resident, in the vicinity of the crime. Also, that it was relevant to show the defendant's possession of a red Ford pickup truck, which was seen at another time in the area where the crime was committed. We agree.

The testimony did not imply criminal misconduct on the part of the defendant. The trial court was very cautious so as to prevent any indication, through Officer Carlson's testimony, that the defendant may have violated the law.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Fed.R.Evid. 401; *People v. Monroe* (1977), 66 Ill.2d 317, 322, 5 Ill.Dec. 824, 362 N.E.2d 295.) "Relevancy is established where a fact offered tends to prove a fact in controversy or renders a matter in issue more or less probable." (*Marut v. Costello* (1966), 34 Ill.2d 125, 128, 214 N.E.2d 768.) Officer Carlson's testimony was relevant to place the defendant in the vicinity of the crime within 24 hours before it was committed. It is particularly relevant here because the defendant was an out-of-State resident who was residing in Iowa with his parents at the time of the offense, while on leave from his army post in the State of Washington.

The defendant next contends that during the guilt phase, and again at the aggravation/mitigation phase of the trial, testimony concerning the victims' families was admitted which was irrelevant and highly prejudicial, thereby denying the defendant a fair trial. The State made certain references to Bonnie Serpico's family in its opening statement, and it had Andrew Serpico, the victim's husband, testify at the guilt phase of the trial. We will discuss later whether the testimony at the aggravation/mitigation phase of the trial was properly admitted.

Mr. Serpico testified that he was married to Bonnie Serpico for 14 years. He testified that they had two children and the evening before the murder they had gone out to a restaurant for dinner. His testimony established the identity of the murder victim and that she was a living person in good health prior to her departure for work the night she was murdered. He also established that certain clothing found at the scene of the crime belonged to Bonnie Serpico and that she had worn those clothes to work the night she was murdered. He testified that his wife was survived by a sister who was pictured in a photograph he gave to the police.

Defendant argues that these statements constitute reversible error, relying on this court's decisions in *People v. Wilson* (1972), 51 Ill.2d 302, 231 N.E.2d 626, *People v. Bernette* (1964), 30 Ill.2d 359, 197 N.E.2d 436, *People v. Dukes* (1957), 12 Ill.2d 334, 146 N.E.2d 14, and *People v. Jackymiak* (1943), 381 Ill. 528, 46 N.E.2d 50.

[24, 25] A defendant's guilt must be established by competent evidence uninfluenced by bias and prejudice. Generally, the rule is that "where testimony in a murder case respecting the fact the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence." (*People v. Bernette* (1964), 30 Ill.2d 359, 371, 197 N.E.2d 436.) "However, every mention of a deceased's family does not *ipso facto* entitle the defendant to a new trial, since in certain instances, dependent upon the facts, such a statement can be harmless." *People v. Jordan* (1967), 38 Ill.2d 83, 91-92, 230 N.E.2d 161; *People v. Wilson* (1972), 51 Ill.2d 302, 281 N.E.2d 626; *People v. Golson* (1965), 32 Ill.2d 398, 207 N.E.2d 68; *People v. Brown* (1964), 30 Ill.2d 297, 196 N.E.2d 664.

The case at bar is such an instance, since significant factual distinctions exist between this case and the ones relied on by the defendant. Those cases reveal that the prosecution there did more than just make the jury aware of the fact that the deceased left behind a spouse and children. Rather, in those cases, the prosecution dwelt upon the deceased's family in closing argument to the point that the jury could have related that evidence to the defendant's guilt. Herein, the evidence was not accompanied by testimony or statements of the tender years of the children left behind by Bonnie Serpico, nor was there an inflammatory closing argument. (See *People v. Jordan* (1967), 38 Ill.2d 83, 92, 230 N.E.2d 161.) Also, the trial court ruled the testimony admissible for the purpose of identification

of the decedent. (See *People v. Brown* (1964), 30 Ill.2d 297, 196 N.E.2d 664; *People v. Golson* (1965), 32 Ill.2d 398, 410, 207 N.E.2d 68.) Common sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members.

[26] We believe that the testimony of Andrew Serpico and his references to his family were properly admitted, that the statements were incidental and not calculated, and that they were not presented in such a manner as to cause the jury to believe this fact to be material as to the defendant's guilt. See *People v. Wilson* (1972), 51 Ill.2d 302, 307, 281 N.E.2d 626.

The defendant contends that the admission of certain physical evidence and photographs during the trial caused him prejudice requiring the reversal of his convictions. The items the defendant objects to were seized at his residence in Dubuque pursuant to a search warrant. The items include a gun holster, boxes of ammunition, an ammunition-reloading device, plastic earmuffs, a gun box, a photo of clothing and the area where it was found, and a photo of the murder weapon and related paraphernalia.

The State argues that the physical evidence is relevant to prove constructive possession and control of the murder weapon and the bag in which the weapon was apparently kept, together with ammunition suitable for the commission of the crime.

[27, 28] The trial court ruled the evidence admissible. We believe the trial court's ruling was proper. As we stated previously, relevant evidence means evidence having any tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. The general rule is that physical evidence may be admitted provided there is proof to connect it with the defendant and the crime. (See *People v. Ashley* (1960), 18 Ill.2d 272, 164 N.E.2d 70; *People v. Miller* (1968), 40 Ill.2d 154, 238 N.E.2d 407.) It is only necessary that the object at least be suitable for the commission of the crime (*People v. Miller* (1968), 40 Ill.2d 154, 238 N.E.2d 407), but it is not necessary that the object actually be used in committing the crime (*People v. Magby* (1967), 37 Ill.2d 197, 226 N.E.2d 33).

In this case the State had the burden of proving the defendant had possession of the gun. The gun admitted in evidence was the gun used to kill Bonnie Serpico and to injure Lori Rowe. Detective Velon testified that when he searched the house he found a bag in the basement of the house which contained the gun later proved to be the murder weapon. Also in that bag was the evidence objected to by the defendant—the gun holster, plastic earmuffs, boxes of ammunition, including .357-caliber and .38-caliber bullets, and a belt with 13 rounds of ammunition on it. The gun was in the holster, and that was attached to the belt which had bullets on it. All of these items were found inside the bag. The reloading apparatus and component parts were located in the immediate area of the bag.

We believe the evidence was relevant because it tended to establish the existence of the material fact that the defendant possessed a gun and, in fact, must have been familiar with guns. There was testimony that the defendant entered the office building with a "cloth bag," though it was never definitely stated that the "cloth bag" and the bowling bag or gym bag, as it was also described, were one and the same. Lori Rowe also testified that Bonnie Serpico looked in the bag and stated, "You came prepared for this," and the defendant replied, "Yes, I've all sorts of stuff in there." The defendant's cousin testified that, when the defendant arrived at her house in St. Charles at 6:30 a.m. on April 24, 1978, some 2½ hours after the crime, she saw the defendant get out of his truck and take a gym bag from the cab of the truck and put it in the rear of the truck.

We must not confuse the distinction between the admissibility of evidence and its probative value. (See *People v. Scott* (1963), 29 Ill.2d 97, 113, 193 N.E.2d 814; McCormick, Evidence sec. 185, at 434 (2d ed. 1972).) In *Scott* the court held that the

trial court had erred in sustaining defendant's objection to the introduction of a wrench which had been found near the decedent's body. The court stated:

"The argument of the defendant that the wrench must first be connected with the defendant before it may be admitted into evidence confuses the distinction between the admissibility of evidence and its probative value. * * * The defendant is entitled to argue to the jury the lack of any connection between the wrench and the defendant, or the lack of proof that the defendant owned or used the wrench; he may point out the weakness of its probative value, but he cannot bar its admission." *People v. Scott* (1963), 29 Ill.2d 97, 113–14, 193 N.E.2d 814.

The defendant relies on *People v. Miller* (1968), 40 Ill.2d 154, 238 N.E.2d 407, and *People v. Smith* (1952), 413 Ill. 218, 108 N.E.2d 596. In *Miller* the court stated that there was no showing that the object admitted was even suitable for the commission of the crime or that the items were in any way connected with the defendant because they were found in a codefendant's car. *Miller* did not deal with the issue present here—the State here was attempting to prove that this murder weapon was connected to this defendant.

People v. Smith (1952), 413 Ill. 218, 108 N.E.2d 596, is distinguishable because the items admitted into evidence were never connected by the State to the crime committed. The items admitted into evidence were two sawed-off shotguns and ammunition for them not alleged to be connected with the crime. The gun used to commit the murder in *Smith* was identified and admitted into evidence. Also, the items of evidence improperly admitted were other weapons obviously not used in the crime.

Here, only one gun—the murder weapon—was introduced into evidence. The other items were relevant to show familiarity with guns in general and to connect the defendant with the murder weapon in particular. The other items were closely enough related to the use and maintenance of the murder weapon to make evidence that defendant possessed these items relevant. These items, as well as the photographs, were properly admitted into evidence.

[29] Even if some of this evidence were irrelevant, no prejudicial error resulted to this defendant. The evidence of the defendant's guilt is overwhelming, and the introduction of this physical evidence could not have served to arouse or inflame the jury.

We now address the issues raised by the defendant relating to the death penalty phase of his trial.

[30] The defendant argues that the indictment did not sufficiently inform him that the death penalty would be sought. The basis for this argument is that the indictment did not charge the defendant with burglary, and although he was charged with attempted rape, defendant argues that an attempt is not an aggravating factor. In *People v. Walker* (1982), 91 Ill.2d 502, 64 Ill.Dec. 531, 440 N.E.2d 83, we held that the death penalty statute "does not require that the other felony be completed or that the defendant be charged with or convicted of the other felony or an attempted felony." (*People v. Walker* (1982), 91 Ill.2d 502, 511, 64 Ill.Dec. 531, 440 N.E.2d 83.) Consequently, the defendant was sufficiently informed in the indictment that the death penalty could be sought because he was charged with the murder and attempted rape of Bonnie Serpico. See *People v. Ruiz* (1982), 94 Ill.2d 245, 265, —— Ill.Dec. ——, 447 N.E.2d 148.

In *People v. Brownell* (1980), 79 Ill.2d 508, 524, 38 Ill.Dec. 757, 404 N.E.2d 181, we stated:

"Secondly, without holding that every indictment must contain every aggravating factor which the State will attempt to prove, we hold that, in the indictment involved here, one of the aggravating factors found by the court at the sentencing hearing was sufficiently alleged in the indictment to fulfill the requirements of law."

As we have stated, in our case one of the aggravating factors was sufficiently alleged in the indictment so as to inform the defendant of the potential penalty in this case. The defendant was also made aware on the third day of jury selection that burglary would also be proved as an aggravating factor. Thus, the defendant was sufficiently informed of both aggravating factors prior to the introduction of testimony at the trial.

Also, the trial court ruled prior to jury selection that the jury must be qualified under *Witherspoon* and that each side would have 20 peremptory challenges since it was a death penalty case.

The defendant's next claim is that the prosecutor's closing argument concerning the insanity defense at the guilt phase of the trial prejudiced the defendant so as to establish "good cause" under section 9–1(d)(2)(C) (Ill.Rev.Stat.1977, ch. 38, par. 9–1(d)(2)(C)) to discharge the first jury and impanel a new jury for sentencing. Defendant asserts that the prosecutor's closing argument at the guilt phase that no insanity defense existed as a matter of law and that the intoxication defense was a false defense or a lie predisposed the jury to reject evidence of extreme mental or emotional disturbance at the sentencing phase.

First, we note that the closing comments alluded to by the defendant now were not objected to at trial, thus precluding these claims. *People v. Lewis* (1981), 88 Ill.2d 129, 149, 58 Ill.Dec. 895, 430 N.E.2d 1346; *People v. Carlson* (1980), 79 Ill.2d 564, 575–78, 38 Ill.Dec. 809, 404 N.E.2d 233.

[31] Even if not precluded by waiver, our review of the record shows the prosecutor's argument to be proper comment upon the evidence. Also, the sentencing phase of the trial did not begin until five weeks after the jury returned its verdict, and it is pure conjecture on the part of the defendant that any prejudice resulted to him. "Good cause" to impanel a new jury for the purposes of sentencing was not shown. See *People v. Lewis* (1981), 88 Ill.2d 129, 146–47, 58 Ill.Dec. 895, 430 N.E.2d 1346.

The defendant next contends that the jury was improperly instructed in several aspects as to whether the death penalty should have been imposed. The defendant offered two instructions detailing nonstatutory mitigating factors to be considered by the jury. The court refused both instructions and instructed the jury as follows:

"Mitigating factors include, *but are not limited to the following circumstances:*

(1) The defendant has no significant history of prior criminal activity.

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution.

If, from your consideration of the evidence, you find that any of the above mitigating factors are present in this case, *or that any other mitigating factors are present in this case*, then you should consider such factors in light of any existing aggravating factors in determining whether the death sentence shall be imposed." (Emphasis added.)

[32] This instruction includes the two relevant statutory mitigating factors and also properly provides that mitigating factors are not limited to those listed, but that the jury should consider any other mitigating factors present in this case. This instruction, contrary to defendant's contention, satisfies *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. The instruction given required the jury to consider all mitigating factors as required by *Lockett*. It does not preclude the jury "from considering, as *a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973, 990.

[33] Defendant's next alleged error is that the trial court did not instruct the jury to consider the potential of the defendant to be restored to useful citizenship pursuant to section 11 of article I of the 1970 Illinois Constitution. This issue was recently decid-

ed in *People v. Gaines* (1981), 88 Ill.2d 342, 381–82, 58 Ill.Dec. 795, 430 N.E.2d 1046, where we held that the requirement of section 9–1(c) of the Criminal Code of 1961 (Ill.Rev.Stat.1977, ch. 38, par. 9–1(c)) that the sentencing jury consider "any mitigating factors which are relevant to the imposition of the death penalty" was sufficient to satisfy the constitutional provision. As we have stated, the jury was so instructed in this case.

[34] Defendant next alleges that his instruction No. 6(a) should have been given. It states that the jury is not required to find any statutory mitigating factors in order to conclude that the death penalty should not be imposed. Our previous discussion demonstrates that the jury was instructed to consider all mitigating factors, not just statutory mitigating factors, and we need not discuss this issue further.

[35, 36] The defendant's last contention regarding the instructions given at the aggravation/mitigation phase is that the jury was not instructed that the prosecution bore the burden of proving beyond a reasonable doubt that no mitigating factors are present. *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181, disposed of this issue. In *Brownell* we stated that a unanimous jury or the court must *weigh* the mitigating factors against the aggravating factors and must conclude that there are no mitigating factors sufficient to preclude the imposition of the death sentence. (*People v. Brownell* (1980), 79 Ill.2d 508, 534, 38 Ill.Dec. 757, 404 N.E.2d 181, Ill.Rev.Stat.1977, ch. 38, pars. 9–1(g), (h).) It is not a question of the State proving an issue beyond a reasonable doubt at this phase of the trial. Rather, it is a weighing process, which we determined to be constitutional in *Brownell*.

[37] The defendant also argues that certain testimony admitted at the aggravation/mitigation phase of trial was not relevant. Specifically, defendant contends that Officer Scott Carlson's more detailed testimony of a traffic stop of the defendant in Winfield, Illinois, about 24 hours before the crime was irrelevant. Defendant also contends that testimony concerning the victim's family was irrelevant and prejudicial, violating his due process rights and thereby requiring a new sentencing hearing.

Section 9–1(c) states:

> "The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty." (Ill.Rev.Stat.1977, ch. 38, par. 9–1(c).)

Section 9–1(e) provides:

> "Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials." (Ill.Rev.Stat. 1977, ch. 38, par. 9–1(e).)

Our statute clearly provides that the only finding necessary in determining the admissibility of evidence at the aggravation/mitigation phase is that the evidence be relevant. The rules of evidence, as provided in section 9–1(e), are suspended at this stage, so that the judge or jury, as the sentencing authority, may have all relevant evidence before it. In this phase of the sentencing hearing, the State and defendant are allowed considerable leeway in the presentation of relevant evidence as long as the evidence is also reliable. See *People v. La Pointe* (1981), 88 Ill.2d 482, 497, 59 Ill.Dec. 59, 431 N.E.2d 344; *People v. Adkins* (1968), 41 Ill.2d 297, 300, 242 N.E.2d 258.

In *Woodson v. North Carolina* (1976), 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, the court noted the importance of placing before the sentencing jury all relevant factors and circumstances focusing on the character and record of the individual offender and the circumstances of the particular offense. *People v. La Pointe* (1981), 88 Ill.2d 482, 59 Ill.Dec. 59, 431 N.E.2d 344, emphasizes the broad standard governing admissibility of evidence in sentencing proceedings without regard to the "restrictive rules of evidence properly applicable to the trial," quoting *Williams v. New York* (1949), 337 U.S. 241,

247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337, 1342. *La Pointe* also emphasized that the factors controlling admissibility of evidence in a sentencing hearing were the relevance and reliability of the proffered evidence. (See *People v. La Pointe* (1981), 88 Ill.2d 482, 498, 59 Ill.Dec. 59, 431 N.E.2d 344.) The admission of relevant and reliable evidence at the sentencing hearing does not violate the due process guarantees of the Federal Constitution. See *People v. La Pointe* (1981), 88 Ill.2d 482, 498, 59 Ill.Dec. 59, 431 N.E.2d 344.

The same benchmarks of relevance and reliability apply whether the sentencing authority is the trial judge or the jury. Whether evidence is relevant and reliable is initially determined by the trial court in the exercise of its informed discretion. *People v. La Pointe* (1981), 88 Ill.2d 482, 498, 59 Ill.Dec. 59, 431 N.E.2d 344.

La Pointe dealt with prior misconduct for which the defendant was not prosecuted or convicted. We stated there that "[t]he conduct testified to was relevant to a determination of a proper sentence in that it bore upon the likelihood or unlikelihood that defendant would commit other offenses; it appeared trustworthy; defendant had the opportunity to face and cross-examine the witness; and the accuracy of the information was not challenged." *People v. La Pointe* (1981), 88 Ill.2d 482, 498-99, 59 Ill. Dec. 59, 431 N.E.2d 344.

[38] Applying the *La Pointe* test, we find that Officer Carlson's testimony was both relevant and reliable. He testified that he observed a red Ford pickup truck driving slowly past residences and commercial establishments in the downtown area of Winfield. The driver of the truck appeared to be looking at the residences and businesses. It was approximately 4 a.m. on April 23, 1978, approximately 24 hours before the murder in Glen Ellyn. Officer Carlson noticed a car next to the truck and the occupants appeared to be talking by use of their citizen-band radios. The officer also testified that he ran a license check on the Ford truck and was informed that the owner of the truck had been convicted of theft some years earlier. All these facts combined to cause the officer to be suspicious, and he continued to follow the truck. Both vehicles continued through the town slowly, still appearing to look over the businesses and houses. The officer then testified that he stopped the truck and determined that James Free was the driver. The officer had summoned help prior to the stop, and his fellow officer observed a gym bag in the truck.

Defense counsel elicited on cross-examination that the officer did not observe the driver of the truck commit any crime. Officer Carlson also testified on cross-examination that the defendant told him he was born in Winfield and lived there for a number of years. The officer testified that he told the defendant to look around town during the daytime, rather than in the early morning hours.

Relevance may be considered as existing in various degrees. We find this testimony to be sufficiently relevant to be admissible at the sentencing hearing. It again tied together the defendant, the red pickup truck and the gym bag. Although the testimony does not relate to an arrest or conviction, it did disclose the propensity of the defendant to "prowl around" at 4 a.m., approximately the hour at which the crimes were committed the next day. The testimony appeared trustworthy. Defendant had the opportunity to face and cross-examine the witness, and the accuracy of the information was not challenged. We can see no prejudice to the defendant by the admission of this testimony. The trial judge did not abuse his informed discretion in admitting this relevant and reliable evidence.

The defendant also contends that the testimony of Deborah Ahlstrand, a probation officer for Du Page County, was improperly admitted. She conducted a presentence investigation, interviewing approximately 18 people. Ahlstrand testified that she met with Bonnie Serpico's mother, husband and two children. She testified as to emotional effects on the family in general. She also testified that the Serpico family moved af-

ter the murder because the children and their grandmother could not enter the old house. Mr. Serpico told the probation officer that he felt "completely shut out" and that "the biggest loss was that his two daughters would not have a mother to relate to as they were growing up, as they were experiencing young adulthood and marriage, pregnancy, those times when mothers and daughters have a close relationship."

The probation officer testified that Bonnie Serpico's mother was "particularly depressed over the way in which her daughter died." Also, that she took tranquilizers until June or July of 1979.

Ahlstrand also interviewed Lori Rowe's parents. Mrs. Rowe, the victim's mother, stated that her daughter was no longer trusting of other people but very suspicious of most people. The probation officer also testified that Miss Rowe had returned to college in the fall of 1978 and that she had not seen a psychiatrist or a psychologist since she was hospitalized immediately after the incident.

[39] The defendant did not object to the admissibility of this testimony but only as to the admissibility of the presentence report itself, which was not admitted into evidence. In fact, the defendant requested that the presentence investigation and report be made over the State's objection. We conclude that the failure to object to the admission of this evidence operates as a waiver of the right to consider the question on appeal. (*People v. Lewis* (1981), 88 Ill.2d 129, 149, 58 Ill.Dec. 895, 430 N.E.2d 1346; *People v. Carlson* (1980), 79 Ill.2d 564, 575–76, 38 Ill.Dec. 809, 404 N.E.2d 233.) As noted, the defendant did object to the introduction of the presentence report itself, and the court did not admit it. If a timely objection would have been made to the testimony of the probation officer concerning the results of her presentence investigation, the court could have ruled on the admissibility of the testimony now objected to. Not having given the court this opportunity, the defendant waived the right to raise the question in this court.

This court has held that testimony pertaining to a victim's surviving family is improper. (*People v. Bernette* (1964), 30 Ill.2d 359, 197 N.E.2d 436.) However, the evidence complained of was not introduced at the guilt phase of the trial, or at the phase of the trial wherein the existence of the aggravating factors must be proved. The relevant considerations controlling admissibility of evidence at the phase of the sentencing hearing with which we are now concerned are as follows: When establishing the presence of the statutory aggravating factors, the State's proof is governed by the rules of evidence. Only after the jury had determined that the State had established the aggravating factors beyond a reasonable doubt did the hearing move into the second phase of additional aggravating factors and mitigating factors as to which the rules of evidence are not applied. In this phase of the sentencing hearing the State and defendant are allowed considerable leeway in the presentation of relevant evidence. The Supreme Court in both *Gregg*, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886–87 and *Woodson*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 960–61 and four members of that court in *Lockett v. Ohio* (1978), 438 U.S. 586, 604–05, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973, 989–90 (Burger, C.J., joined by Stewart, Powell, and Stevens, JJ.), noted the importance of placing before the sentencing jury all relevant factors and circumstances which have an impact upon the imposition of an appropriate sentence. *Gregg* specifically noted that information which may have been irrelevant or extremely prejudicial on the question of guilt might be relevant and admissible in a sentencing hearing. (428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859, 884.) Our recent opinion in *People v. La Pointe* (1981), 88 Ill.2d 482, 495–99, 59 Ill.Dec. 59, 431 N.E.2d 344, reemphasizes the broad standard governing admissibility of evidence in sentencing proceedings without regard to the "'restrictive rules of evidence properly applicable to the trial,'" quoting *Williams v. New York* (1949), 337 U.S. 241, 247, 69

S.Ct. 1079, 1083, 93 L.Ed. 1337, 1342. We also emphasized that the factors controlling admissibility were the relevance and reliability of the proffered evidence, a determination which lies within the discretion of the trial judge.

The defendant has raised *Henry v. Wainwright* (5th Cir.1981), 661 F.2d 56, *cert. allowed* (1982), 457 U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326, as additional authority relating to issues dealing with the third phase of his trial. The court in *Henry* held that a jury instruction permitting consideration of nonstatutory aggravating factors in a death penalty case was unconstitutional. We do not find *Henry* applicable because our statutory procedure is different from that of Florida's death penalty law, under which the defendant in *Henry* was sentenced.

Florida's death penalty law provides for only two phases—guilt and sentencing. That State's statute provides that only statutory aggravating factors should be considered by the jury. In *Henry* the trial judge gave an erroneous instruction in permitting the jury to consider "all factors which are aggravating." The defendant did not object at trial to the instruction, and the issue was waived on appeal. The Federal district court granted a writ of *habeas corpus*, and the court of appeals affirmed on constitutional grounds.

[40] In Illinois, unlike Florida, the judge or jury *must* first determine whether the State has proved a statutory aggravating factor beyond a reasonable doubt before it proceeds to weigh aggravating and mitigating factors and to make its decision whether or not to sentence the defendant to death. (Ill.Rev.Stat.1977, ch. 38, pars. 9–1(g), (h); see *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859.) We conclude that the sentencing body's discretion, under our statute, is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action, satisfying *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, and its progeny.

The last argument raised by the defendant is that the death penalty cannot be imposed on him because it is an excessive and disproportionate penalty in light of his character and personal background. Defendant relies on *People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233, in which this court vacated the death sentence and remanded for the imposition of a lesser penalty. In *Carlson* the defendant had killed his ex-wife, a police officer and burned his ex-wife's home. The defendant and his ex-wife were divorced but planned to remarry soon. She cancelled their second marriage and told the defendant about her boyfriend and showed the defendant a diamond engagement ring and other gifts which had been given to her by her male friend. They returned to her home, and the defendant shot and killed his ex-wife and then set fire to the house. Police officers went to a bar to arrest the defendant and he killed one of the officers. Other evidence in the record showed that the defendant gave $3,200 in an envelope to a friend with instructions to give it to his daughter for his son's use.

We stated in *Carlson* that "[t]hese mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society." (*People v. Carlson* (1980), 79 Ill.2d 564, 590, 38 Ill.Dec. 809, 404 N.E.2d 233.) This court went on to state, "[W]e see an individual with no past criminal record who would in all probability be leading a life acceptable to our society had not his unfortunate marital affair triggered this tragic sequence of events." *People v. Carlson* (1980), 79 Ill.2d 564, 590, 38 Ill.Dec. 809, 404 N.E.2d 233.

[41–43] Determining whether a death sentence is proper in a particular case "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976), 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961, see Ill.Const.1970, art. I, sec. 11; *People v. Gleckler* (1980), 82 Ill.2d 145, 162, 44 Ill.Dec. 483, 411 N.E.2d 849; *People v. Carlson* (1980), 79 Ill.2d 564, 590, 38 Ill.Dec. 809,

404 N.E.2d 233.) A sentence does not offend the proportionality requirement if it is commensurate with the seriousness of the crimes and gives adequate consideration to any relevant mitigating circumstances, including the rehabilitative potential of the defendant. (*People v. Carlson* (1980), 79 Ill.2d 564, 587, 38 Ill.Dec. 809, 404 N.E.2d 233; *People v. Gaines* (1981), 88 Ill.2d 342, 380–82, 58 Ill.Dec. 795, 430 N.E.2d 1046.) This court has acknowledged the necessity to avoid arbitrary or capricious death sentences by adequately defining capital crimes, by directing sentencing discretion, and by providing adequate judicial review. (*People v. Lewis* (1981), 88 Ill.2d 129, 164–65, 58 Ill.Dec. 895, 430 N.E.2d 1346; *People v. Gleckler* (1980), 82 Ill.2d 145, 161–62, 44 Ill.Dec. 483, 411 N.E.2d 849; *People v. Brownell* (1980), 79 Ill.2d 508, 532–34, 38 Ill.Dec. 757, 404 N.E.2d 181.) We have repeatedly demonstrated our concern as to the responsibilities involved in our review of capital cases and have not hesitated to vacate death penalties where improperly imposed. *People v. Walker* (1982), 91 Ill.2d 502, 64 Ill.Dec. 531, 440 N.E.2d 83; *People v. Gleckler* (1980), 82 Ill.2d 145, 44 Ill.Dec. 483, 411 N.E.2d 849; *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181; *People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233.

It is our opinion, however, that this case is not similar to *Carlson*. Unlike in *Carlson*, the tragic event here was not triggered by any innocent or independent event for which defendant was not responsible. Rather, this defendant acted deliberately with the intent to rape and kill two persons. Also, unlike *Carlson*, this defendant does have a history of past criminal activity. He was convicted of theft and testified that he had used various drugs during his lifetime. There was also testimony that the defendant carried a concealed weapon in his truck. Lori Rowe testified that the defendant stated that "he had done this before" and it was for the jury to draw an inference as to whether the defendant had done so or not. Testimony in mitigation was given concerning defendant's military service, his work record and his home life. However, existence of a mitigating factor does not necessarily preclude the imposition of the death penalty. *People v. Brownell* (1980), 79 Ill.2d 508, 537, 38 Ill.Dec. 757, 404 N.E.2d 181.

[44] Focusing on the individual offender and the circumstances of the particular offense, we are of the opinion that this case more nearly resembles *People v. Ruiz*, (1982) 94 Ill.2d 245, — Ill.Dec. —, 447 N.E.2d 148, *People v. Lewis* (1981), 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346, and *People v. Gaines* (1981), 88 Ill.2d 342, 58 Ill.Dec. 795, 430 N.E.2d 1046, than it does *Carlson*. Our responsibilities neither require nor permit reversal where no reasonable doubt of guilt exists, no reversible error has occurred, and there is no indication that the jury imposed the penalty in an arbitrary, capricious or uneven manner.

The defendant has not raised any error as to the sentences for the other offenses, and we therefore need not address these sentences.

We accordingly affirm the judgment of the circuit court of Du Page County. The clerk of this court is directed to enter an order fixing Tuesday, May 24, 1983, as the date on which the original sentence of death entered in the circuit court is to be executed. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and to the wardens of the Illinois State Penitentiary at Menard and Joliet.

Judgment affirmed.

CLARK, J., concurring in part and dissenting in part:

I concur in the affirmation of guilt. I would, however, vacate the penalty of death. I feel it was improperly imposed.

The jury at the sentencing hearing found that Bonnie Serpico was killed in the course of a rape and burglary. After the jury determined that no mitigating factors existed that were sufficient to preclude the imposition of death, the defendant was sentenced to die.

I believe that the sentencing jury was under a misapprehension in sentencing the defendant. The defendant was never charged with or convicted of rape or burglary, and yet the jury concluded that the defendant committed the murder in the course of a rape and a burglary.

I disapprove of the prosecuting attorney's introduction of evidence at the sentencing hearing of the alleged burglary when no such felony was charged or proved at trial. Because of the frequency with which this court has been confronted with questions of possible prosecutorial overreaching at the sentencing hearing, I believe it incumbent on us or perhaps on the legislature to adopt guidelines to be used.

In seeing that the penalty of death is not applied in an arbitrary or capricious manner (*Gregg v. Georgia* (1976), 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883), the United States Supreme Court has defined the State's responsibility to provide " 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia* (1980), 446 U.S. 420, 428, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398, 406. See also *People v. Gleckler* (1980), 82 Ill.2d 145, 162, 44 Ill.Dec. 483, 411 N.E.2d 849.

The rules of evidence that must be adhered to in a criminal trial in this State do not apply at the sentencing hearing. (Ill. Rev.Stat.1979, ch. 38, par. 9–1(e).) In *People v. La Pointe* (1981), 88 Ill.2d 482, 59 Ill.Dec. 59, 431 N.E.2d 344, this court addressed the difference between the rules of evidence at trial and the rules at a sentencing hearing and recalled the words of the United States Supreme Court in *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337:

"Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." (337 U.S. 241, 246–47, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337.)

Just the same it is clear that at a death penalty hearing the sentencing jury's attention should be focused on "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." *Woodson v. North Carolina* (1976), 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961; *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. See *People v. Walker* (1982), 91 Ill.2d 502, 515, 64 Ill.Dec. 531, 440 N.E.2d 83.

I am concerned that the procedure at a death penalty hearing be such that we can be assured of rational and consistent sentences imposed by different juries. Justice Stewart in *Woodson* saw the "need for reliability in the determination that death is the appropriate punishment in a specific case," since there is a "qualitative difference" between the death penalty and all other forms of punishment. *Woodson v. North Carolina* (1976), 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961.

Despite the broad statutory language, there should be limitations as to the evi-

dence that can be considered by a sentencing jury—a group of men and women who are called upon to weigh the deliberate taking of a human life. Setting some definitive guidelines should help to assure equality of treatment at a sentencing hearing. For in the words of Justice Marshall, "Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon." *Lockett v. Ohio* (1978), 438 U.S. 586, 620, 98 S.Ct. 2954, 2973, 57 L.Ed.2d 973, 999–1000 (Marshall, J., concurring).

If we allow the sentencing hearing to be completely unrestrained as to what can be admitted into evidence, we will encourage both the prosecution and defense counsel to search for the most colorful attention getter that, while extraneous to what happened or irrelevant to the defendant's character, could successfully divert the jury's attention. We should not allow such a result, for to do so is to risk that capital punishment will be imposed in an arbitrary way. And as the United States Supreme Court said in *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393, 402:

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

See *People v. Gleckler* (1980), 82 Ill.2d 145, 162, 44 Ill.Dec. 483, 411 N.E.2d 849.

I would propose that, as a step towards establishing guidelines for consistent sentencing to guard against jurors' imposition of the death penalty under the influence of passion or prejudice, the following limitations of evidentiary considerations at a death penalty hearing should be adhered to: If the evidence offered is extraneous to the facts and circumstances of the case or the character of the defendant, it is not admissible; if it would tend to divert the jury's attention from the aggravating or mitigating factors before them, it should be excluded; and if the evidence impinges upon any fundamental constitutional guarantee, it cannot be admitted at the sentencing hearing.

The United States Supreme Court has clearly indicated that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393, 402.) It does not appear to me that the decision to sentence James P. Free, Jr., to death was based upon reason. I dissent from the affirmation of the death penalty.

SIMON, J., joins in this partial concurrence and partial dissent.

SIMON, Justice, also concurring in part and dissenting in part:

I join in the partial concurrence and partial dissent of Justice Clark and in his constructive proposal for establishment of guidelines to control death sentence hearings. I also believe that another grave error occurred at the sentencing stage which independently requires us to vacate the sentence of death.

The defendant complains that the testimony of Deborah Ahlstrand, a probation officer for Du Page County, was admitted into evidence despite its likely prejudicial effect and its irrelevance to the sentencing inquiry. Ms. Ahlstrand interviewed Lori Rowe's mother and Bonnie Serpico's mother, husband and two children and testified as to the emotional effects the defendant's conduct had on them. She related that Lori Rowe's mother stated that her daughter had become very suspicious of people in general, and further reported that Bonnie Serpico's mother had grown depressed and had begun taking tranquilizers. Ms. Ahlstrand also testified that Bonnie's husband felt " 'completely shut out' " after her death and that " 'the biggest loss was that his two daughters would not have a mother to relate to as they were growing up, as they were experiencing young adulthood and marriage, pregnancy, those times when mothers and daughters have a close relationship.' " 94 Ill.2d at 424–25, —— Ill.Dec. at ——, 447 N.E.2d at 241.

The majority concludes that the defendant waived the issue because he failed to object when the testimony was admitted. While the general rule is that a failure by defendant to object at trial constitutes a waiver on appeal (see, *e.g.*, *People v. Precup* (1978), 73 Ill.2d 7, 21 Ill.Dec. 863, 382 N.E.2d 227), this court has recognized on numerous occasions that plain errors that affect substantial rights of the parties may be addressed even though there was no objection at trial. (*People v. McCarty* (1983), 94 Ill.2d 28, 36–37, 67 Ill.Dec. 818, 445 N.E.2d 298; *People v. Jones* (1982), 94 Ill.2d 275, 294–95, — Ill.Dec. ——, 447 N.E. 2d 161; *People v. Carlson* (1980), 79 Ill.2d 564, 576–77, 38 Ill.Dec. 809, 404 N.E.2d 233; *People v. Brownell* (1980), 79 Ill.2d 508, 542, 38 Ill.Dec. 757, 404 N.E.2d 181; see 73 Ill.2d R. 615(a).) It is all the more important that this court provide an avenue for review of such errors in a capital case, where the defendant's life hinges on such review; few propositions have a longer pedigree in the common law of this State than that any irregularity not *expressly* waived in the trial of a capital case must be heard on review. (*Nomaque v. People* (1825), 1 Ill. (1 Breese) 145, 149; see *People v. Fisher* (1930), 340 Ill. 216, 259, 172 N.E. 743.) I see no indication that an express renunciation of any right on appeal occurred here.

To the extent that the majority addresses the merits of the issue, it concludes that this case is distinguishable from cases such as *People v. Bernette* (1964), 30 Ill.2d 359, 197 N.E.2d 436, in which this court held the admission during the guilt phase of trial of evidence pertaining to a victim's surviving family to be reversible error. However, while it is true that information can be presented at a sentencing hearing "regardless of its admissibility under the rules governing the admission of evidence at criminal trials" (Ill.Rev.Stat.1977, ch. 38, par. 9–1(e)), this does not mean that the discretion of the trial judge in this regard is without limits. The United States Supreme Court and recent decisions of this court have emphasized that "whether a death sentence is proper in a particular case 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death' " (94 Ill.2d at 428, — Ill.Dec. at ——, 447 N.E.2d at 242, citing *Woodson v. North Carolina* (1976), 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 2978, 2991; see Ill. Const. 1970, art. I, sec. 11; *People v. Szabo* (1983), 94 Ill.2d 327, 352–53, — Ill.Dec. ——, 447 N.E.2d 193; *People v. Gleckler* (1980), 82 Ill.2d 145, 162, 44 Ill.Dec. 483, 411 N.E.2d 849; *People v. Carlson* (1980), 79 Ill.2d 564, 590, 38 Ill.Dec. 809, 404 N.E.2d 233), and that trial courts do not have the discretion to admit evidence at sentencing hearings which does not bear on the aggravating or mitigating factors alleged to exist in a given case or on the circumstances of the offense or the character and rehabilitative potential of the defendant, or the probative value of which in this regard is outweighed by its prejudicial effect (*People v. Szabo* (1983), 94 Ill.2d 327, 363–68, — Ill.Dec. ——, 447 N.E.2d 193; *People v. Devin* (1982), 93 Ill.2d 326, 346–48, — Ill.Dec. ——, — N.E.2d ——; *People v. Walker* (1982), 91 Ill.2d 502, 515, 64 Ill.Dec. 531, 440 N.E.2d 83.)

It would be difficult to find anything less relevant to the circumstances of this offense or the character of this defendant than testimony concerning the reactions of family members of his unfortunate victims. Their reaction was not to the nature of his crimes or the character of the defendant, but to the fact that the crimes happened. An emotional rendition of the grief of a victim's family, while understandable, can only distract the jury from its weighing of the aggravating and mitigating factors peculiar to this defendant and his crime. Such testimony is always inflammatory. The majority's approval of it in this case will give prosecutors and trial judges the idea that we were not serious in our previous pronouncements, and that there are no limits. Why should they content them-

selves with the second-hand testimony of a probation officer? Why not put the victim's children on the stand and ask them what life will be like without their mother?

The testimony of Deborah Ahlstrand had no value other than to arouse passion. By allowing its introduction, we run the risk that capital punishment will be imposed in an arbitrary fashion, and ignore the statement of the United States Supreme Court that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393, 402.

CLARK, J., joins in this partial concurrence and partial dissent.

The PEOPLE of the State of Illinois, Appellee,

v.

Robert KUBAT, Appellant.

No. 53726.

Supreme Court of Illinois.

Jan. 24, 1983.

Rehearing Denied April 8, 1983.

Defendant was convicted in the Circuit Court, Lake County, Robert K. McQueen, J., of aggravated kidnapping and murder, was sentenced to death, and he appealed. The Supreme Court, Underwood, J., held that: (1) evidence sufficiently corroborated accomplice's testimony; (2) photographic identification procedures did not require reversal; (3) defendant, who was represented by appointed public defender and by private counsel, was not deprived of effective assistance of counsel; (4) death sentence was not imposed in violation of double jeopardy principles; and (5) death penalty statute was not unconstitutional.

Affirmed.

Clark, J., concurred in part and dissented in part.

Goldenhersh, J., dissented and filed opinion in which Simon, J., joined.

Simon, J., dissented and issued statement.

1. Criminal Law ⇐511.1(6, 7)

Accomplice's testimony was sufficiently corroborated to sustain defendant's conviction for aggravated kidnapping and murder.

2. Criminal Law ⇐339.7(3, 4)

Initial photographic identification procedures wherein police were interviewing numerous potential witnesses at a time when they were simply attempting to discover whether any nonoccurrence witnesses existed to corroborate accomplice's statement were not improper, nor was a color photographic array so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

3. Criminal Law ⇐339.10(2)

Although it was improper to again use photographic identification technique after persons interviewed had identified defendant's photograph and at a time when arranging for those witnesses to view a lineup would not have inconvenienced either them or police to extent necessary to find extenuating circumstances, any impropriety involved did not affect subsequent positive in-court identifications.

4. Criminal Law ⇐339.5

Reliability is most important factor in determining admissibility of identification testimony.

5. Criminal Law ⇐339.9(2)

Fact that witness did not make a positive in-court identification of defendant did not render her testimony inadmissible.

APPENDIX B

Order Of The Illinois Supreme Court Denying Rehearing

52775 SAD-Elgin

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 8, 1983

RECEIVED
APR 11
OFFICE OF THE STATE APPELLATE DEFENDER
ELGIN, ILLINOIS

State Appellate Defender
Second Judicial District
63 Douglas Street
Elgin, Illinois 60120

No. 52775 - People State of Illinois, appellee, vs. James P. Free, Jr., appellant. Appeal, Circuit Court (DuPage).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

Juleann Hornyak
Clerk of the Supreme Court

Office-Supreme Court, U.S.
FILED
AUG 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES P. FREE, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,
Assistant Attorney General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

THOMAS KNIGHT,
Assistant State's Attorney,
DuPage County, Illinois,

KENNETH A. FEDINETS,
Assistant Attorney General,

Of Counsel.

QUESTIONS PRESENTED FOR REVIEW

1. Can the sentencing authority, after first finding the existence of an appropriate statutory aggravating factor, consider any relevant aggravating and mitigating factors in determining whether to impose a death sentence?

2. Whether the Illinois Supreme Court review procedure in death penalty cases complies with the requirements of the Eighth and Fourteenth Amendments.

3. Whether the fact that Illinois allows the prosecutor to make the decision whether to seek the death penalty violates the Eighth and Fourteenth Amendments.

4. Whether the Petitioner's claim that the protective sweep of his premises violates the Fourth and Fourteenth Amendments raises an issue of constitutional law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii-iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:	
I.	
THIS COURT HAS CONSIDERED AND RESOLVED, IN FAVOR OF THE RESPONDENT, THE PRIMARY QUESTION ASSERTED IN POINT I OF THE PETITION. THE SECONDARY QUESTION, STANDING ALONE, DOES NOT RAISE A COGNIZABLE CONSTITUTIONAL CLAIM. BOTH THE PRIMARY AND SECONDARY QUESTIONS ASSERTED IN POINT I WERE NOT ADEQUATELY PRESERVED FOR REVIEW	2
A.	
This Court Already Has Approved Death Penalty Statutes Which, Like The Illinois Statute, Direct The Sentencing Authority, After First Finding The Existence Of An Appropriate Statutory Aggravating Factor, To Consider Any Relevant Aggravating And Mitigating Factors In Determining Whether To Impose The Death Sentence. Moreover, The Jury Was Properly Instructed Under The Illinois Statute	2
B.	
The Evidence Which The Petitioner Claims Was Irrelevant And Inflammatory Was Properly Admitted And, In Any Event, Does Not Raise An Issue Important Enough To Justify A Grant Of Certiorari In This Case	6
C.	
The Petitioner's Failure To Object In The Trial Court To The Alleged Irrelevancy Or Inflammatory Nature Of The Testimony Relating To The Effects Of The Crime Upon The Surviving Victim And The Family Of The Deceased Is Reason Enough For This Court To Deny A Writ Of Certiorari On That Issue. Likewise, His Failure To Argue Either In The Trial Court Or Before The Illinois Supreme Court, That Consideration Of Non-Statutory Aggravating Factors Violates The Eighth And Fourteenth Amendments Is Reason To Deny The Writ Of Certiorari On That Issue	11
II.	
THE ILLINOIS SUPREME COURT REVIEW PROCEDURE IN DEATH PENALTY CASES COMPLIES WITH THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS	12

III.

THE FACT THAT ILLINOIS ALLOWS THE PROSECUTOR TO MAKE THE DECISION WHETHER TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS..... 14

IV.

THE PETITIONER'S CLAIM THAT THE PROTECTIVE SWEEP OF HIS PREMISES VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS RAISES PRIMARILY, IF NOT SOLELY, A FACTUAL ISSUE RATHER THAN AN ISSUE OF CONSTITUTIONAL LAW..... 16

CONCLUSION..... 17

TABLE OF AUTHORITIES

Page

CASES:

Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983). 2,5

California v. Ramos, ____ U.S. ____, 103 S. Ct. 3446 (1983)..... 8

Estell v. Williams, 425 U.S. 501 (1976)..... 12

Furman v. Georgia, 408 U.S. 289 (1972)..... 12

Gregg v. Georgia, 428 U.S. 153 (1976).....3,5,8-10,13-14,1

Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317 (1983). 11

People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181 (1981).. 13

People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980)... 13

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)..... 8,11,16,17

People v. Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 (1980).. 13

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 9

Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983)... 2,3,5

OTHER AUTHORITIES:

Illinois Constitution of 1970, Art. 6, Section 4..... 5

Ill. Rev. Stat. 1979, Ch. 38, par. 1005-3-2(a)(3)..... 1,8

Ill. Rev. Stat. 1981, Ch. 38, par. 9-1..... 3,4,5

Ill. Rev. Stat. 1981, Ch. 110A, par. 603..... 5

No. 82-6881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES P. FREE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 94 Ill. 2d 378, 447 N.E.2d 218 (1983). A copy of the opinion has been attached to the Petition For Writ Of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

ADDITIONAL STATUTES INVOLVED

Illinois Revised Statutes, Chapter 38, par. 1005-3-2(a)(3):

> 1005-3-2. Presentence report
>
> § 5-3-2. Presentence Report. (a) the presentence report shall set forth:
>
> * * *
>
> (3) the effect the offense committed has had upon the victim or victims thereof, and any compensatory benefit that various sentencing alternatives would confer on such victim or victims; ....

STATEMENT OF THE CASE

The opinion of the Illinois Supreme Court, reported at 94 Ill. 2d 378, 447 N.E.2d 218 (1983), provides an adequate statement of additional facts to supplement the Petitioner's statement. The opinion is included as Appendix A of the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS CONSIDERED AND RESOLVED, IN FAVOR OF THE RESPONDENT, THE PRIMARY QUESTION ASSERTED IN POINT I OF THE PETITION. THE SECONDARY QUESTION, STANDING ALONE, DOES NOT RAISE A COGNIZABLE CONSTITUTIONAL CLAIM. BOTH THE PRIMARY AND SECONDARY QUESTIONS ASSERTED IN POINT I WERE NOT ADEQUATELY PRESERVED FOR REVIEW.

A.

This Court Already Has Approved Death Penalty Statutes Which, Like The Illinois Statute, Direct The Sentencing Authority, After First Finding The Existence Of An Appropriate Statutory Aggravating Factor, To Consider Any Relevant Aggravating And Mitigating Factors In Determining Whether To Impose The Death Sentence. Moreover, The Jury Was Properly Instructed Under The Illinois Statute.

Petitioner first contends that this Court should grant a Writ of Certiorari in this case to determine whether a sentencing authority in a death penalty case can constitutionally consider non-statutory aggravating factors in making its decision. He notes that this issue was before this Court in Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983), which has now been decided. In Barclay, this Court held that there is no constitutional infirmity in a death penalty hearing procedure which allows for the imposition of a death sentence, based in part on relevant non-statutory aggravating factors.

Moreover, as Justice Stevens noted on behalf of the Court in Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733, 2743 (1983):

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

In Zant, this Court went on to conclude that, although evidence of prior assault convictions of the defendant could not be considered as a statutory aggravating factor in deciding the death penalty question (because of a state supreme court

opinion holding it too vague), the Eighth and Fourteenth Amendments do not prohibit the consideration of such evidence as a non-statutory aggravating factor, where a valid statutory aggravating factor has been found to exist. Id. at ____, 103 S.Ct. at 2749.

Thus, to the extent that this case would raise the issue of the constitutionality of a death sentence based in part on non-statutory aggravating factors, the Respondents submit that the issue has been resolved by this Court. The Illinois statute is essentially indistinguishable, in this regard, from the Georgia statute which was originally approved in Gregg v. Georgia, 428 U.S. 153 (1976) and reviewed with approval in Zant v. Stephens.

In Gregg, this Court noted that under the Georgia statute:

> [t]he judge is also required to consider or to include in his instructions to the jury 'any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute.

Gregg v. Georgia, 428 U.S. 153, 164-165 (1976).

The Illinois statute (Ill. Rev. Stat. 1981, ch. 38, par. 9-1) setting forth the procedure for determining whether a death sentence shall be imposed states:

> (e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) [the statutory aggravating factors] may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.
>
> (f) Proof. The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) [the statutory aggravating factors] is on the State and shall not be satisfied unless established beyond a reasonable doubt.

> (g) Procedure - Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) [the statutory aggravating factors] exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) [the statutory aggravating factors] exists, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Subsection (c), referred to in the above quoted section, reads:

> (c) Consideration of factors in Aggravation and Mitigation. The Court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b) [the statutory aggravating factors]. Mitigating factors may include but need not be limited to the following: [various statutory mitigating factors are listed].

Ill. Rev. Stat. 1981, ch. 38, par. 9-1(c).

This comparison reveals, that like the Georgia statute, the Illinois procedure requires that the jury find the existence of at least one of the statutory aggravating factors before the defendant can be sentenced to death. Also, like the Georgia scheme, Illinois then allows the jury to consider any relevant aggravating or mitigating factors in deciding whether to impose the death sentence. In addition, as this Court found to be true of the Georgia statute in Zant, the Illinois statute does not require that the jury give any special weight to any aggravating circumstances.

A second important similarity between the Georgia procedure and the Illinois statute relates to the provisions for review. In Zant, this Court noted that its determination that general, non-statutory aggravating factors may be considered in imposing the death penalty, depended in part, upon the existence under the Georgia statute, of mandatory appellate review. The

Illinois statute also mandates automatic review of all death sentences. Ill. Rev. Stat. 1981, Ch. 38, par. 9-1(i). In fact, both the Illinois Supreme Court Rules, Ill. Rev. Stat. 1981, Ch. 110A, par. 603, and the Illinois Constitution of 1970, Art. 6, Section 4, also require automatic review of all death sentences.

In summary, there simply is no reason for this Court to grant certiorari to review the Illinois statute with respect to the issue of consideration of non-statutory aggravating factors. The decisions of this Court approving the pertinent aspects of the Georgia statute control the questions of the propriety of the Illinois statute with respect to that issue.

When one considers the instructions given by the court to the jury in this case, it becomes equally clear that the judicial guidance given for consideration of non-statutory and statutory aggravating factors (as well as mitigating factors) comports very well with the Eighth and Fourteenth Amendment requirements as laid down by Gregg v. Georgia, Zant v. Stephens, and Barclay v. Florida. The sentencing hearing in this case was conducted separately after the defendant had been found guilty. (R. 7796). That sentencing hearing was then conducted in two distinct phases.

In the first phase, the jury was instructed that they would have to find beyond a reasonable doubt the existence of at least one of the two possible statutory aggravating factors before the defendant could be sentenced to death. (R. 8002). In the second phase, after the jury found both aggravating factors to exist (R. 8015, 8016), the court instructed the jury that they should consider any relevant aggravating and mitigating factors including statutory mitigating factors, in determining whether the death penalty should be imposed. (R. 8441-8443). The court also instructed the jury that aggravating factors are those which provide reasons for imposing a sentence of death and mitigating factors are those which provide reasons for not imposing the death sentence. (R.

8442). The jury was not instructed, as apparently argued by the Petitioner (Petition at 15), that they were required to consider specific evidence.

This procedure and these instructions convincingly demonstrate that the jury in this case received sufficient guidance in the application of their discretion so as to meet the standards of Gregg, Zant, and Barclay. Thus, the actual instruction of the jury in this case pursuant to the Illinois statute provides no reason for granting a writ of certiorari in this case.

B.

The Evidence Which The Petitioner Claims Was Irrelevant And Inflammatory Was Properly Admitted And, In Any Event, Does Not Raise An Issue Important Enough To Justify A Grant Of Certiorari In This Case.

The Petitioner also argues, in Point I of his petition, that certain evidence which the jury may have considered as aggravating circumstances was irrelevant and inflammatory. He contends that this alleged impropriety, together with the allegations that the Illinois statutory procedure is unconstitutional, warrants this Court's acceptance of the case on certiorari. It is not clear whether the Petitioner would argue that the alleged improper evidence, standing alone, still raises an issue sufficiently important to justify a grant of certiorari. The Respondent submits that it clearly does not.

In addition to the fact that the Petitioner has failed properly to preserve this issue (See Point I (c) infra), the Respondent submits that the testimony in question would, at best, raise a relatively minor evidentiary issue in this case, and, therefore, is not significant enough to warrant consideration by this Court on certiorari. Admittedly, the precise question of whether effects of the crime on the family of the victim are relevant as "circumstances of the offense", has not been specifically decided by this Court; and, in an appropriate context, at least some members of this Court may wish to address it. However, there are several circumstances

of this case which show that it is highly unlikely that the testimony in question could have affected the outcome of the death penalty hearing in this case. Thus, the issue is not crucial enough to the controversy so as to be in a desirable posture for review by this Court.

First, as argued separately below, the objection necessary to raise this question was never made in the trial court (R. 8054-8061). Secondly, the particular effects on the surviving victim and the family of the deceased victim, in large part, were not any worse than that which the jury could be expected to surmise, using their own common sense. It would defy human experience to think that jurors do not envision such tragic circumstances in considering the seriousness of a defendant's crime. Indeed, as noted in a different context below, the Petitioner's failure to object may well have been a tactical decision. He may have wanted to use cross-examination to minimize the jury's impressions as to the deleterious effects on the surviving victim and the family of the deceased victim.

A third fact, which shows that the testimony was unlikely to have had an inflammatory effect upon the jury, is that it was presented in a very neutral and detached manner through a probation officer who had conducted a pre-sentence investigation at the insistence of the Petitioner. That same witness presented rather broadly ranging evidence (R. 8084-8097), including background information on the Petitioner, some of which was favorable to the Petitioner. The testimony under attack was but a part of that presentation.

A fourth reason why the testimony as to the effects of the crime was not crucial in this case is that it never became a focal point in the sentencing hearing. The only reference by the prosecutor to the testimony in question, was made during a brief comment by one of the prosecutors in response to the Petitioner's emotional plea for mercy (R. 8408). In that context, it certainly can be argued that the effect of the Petitioner's murderous conduct is at least as relevant as his emotional plea for mercy. A reading of the prosecutor's

closing remarks in total (R. 8360-8408) clearly indicates that there were many other appropriate circumstances upon which the prosecution dwelt. The evidence in question was not unduly emphasized.

In addition to these several facts which show that the testimony under attack was highly unlikely to have affected the jury's verdict, there is another reason why this issue is not appropriate for review on certiorari. This Court has previously noted that it is desirable for the states to determine what may constitute aggravating or mitigating circumstances so long as there is sufficient guidance in making the death sentence decision. California v. Ramos, ____ U.S. ____, 103 S. Ct. 3446 (1983); Gregg v. Georgia, 428 U.S. 153, 192 (1976). The Illinois legislature has determined that the effects of the crime upon the victims should be included in all pre-sentence investigations, such as the one which constituted the basis for the testimony under attack in this case. Ill. Rev. Stat. 1979, Ch. 38, par. 1005-3-2(a)(3). Certainly, as any person who has had occasion to observe or deal with the families of homicide victims becomes poignantly aware, they too are victims of the crime in any true meaning of the word. Indeed, it is the instantaneous, devastating and permanent loss of a loved one to those by whom they are loved which is, in large measure, responsible for the extreme repugnancy society feels toward the crime of murder. Not many of us dread dying as much as we do the specter of losing a loved one or leaving loves behind through the instantaneous violence of a homicide.

Thus, Respondent suggests that this Court should continue in its view that the substantive factors to be considered once the case has been properly qualified for the death penalty, is better left to the states. The Petitioner had an adequate opportunity to litigate the issue, to the extent it was raised, before the Illinois courts. People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 241 (1983). Further review on certiorari is not warranted.

A final factor supporting the Respondent's position that this issue is not appropriate for review is that the substantive claim made by the Petitioner is not meritorious. Properly presented, as it was, the effects of the Petitioner's crime upon the surviving victim, and upon the family of the deceased victim, was relevant evidence.

This Court has made it clear that the death sentencing process must permit consideration of the:

> [C]haracter and record of the individual offender and the circumstances of the particular offense as a constitutionally indisposable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Moreover, this Court also stated in Gregg:

> We think that the Georgia Court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far ranging argument [citation omitted]. So long as the evidence introduced and the arguments do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg v. Georgia, 428 U.S. 153, 203-204 (1976).

These passages clearly illustrate this Court's commitment to the belief that the difficult human decision involved in a death penalty case is best developed through a broad-scoped hearing. Certainly the effects of the Petitioner's murderous conduct upon Lori Rowe, who was fortunate enough to survive his attempt to kill, and the effects upon the family of Bonnie Serpico, fall well within the common sense meaning of the phrase "circumstances of the particular offense."

It is wholly appropriate for sentencing tribunals to begin to take into greater account the needs and concerns of society, particularly of those persons most directly injured by the offender's conduct. This societal need was astutely recognized by this Court in Gregg v. Georgia when Justice Stewart, expressing the opinion of this Court, stated:

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.
>
> In part, capital punishment is expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law.'

Gregg v. Georgia, 428 U.S. 153, 183 (1976)

Proof of the effects of the Petitioner's crime upon the families of the deceased is a proper consideration in a death penalty hearing in light of the legitimate purpose of the death penalty as a lawful channeling of society's need for retribution. To ignore such facts is to ignore a significant basis of society's moral outrage against these repugnant murders.

That is not to say that facts about the effects on the deceased's family should be the focal point of the jury's attention in a death penalty hearing. The Respondent merely asserts that it is proper and relevant testimony which was not unduly emphasized in this case.

In summary, the Respondent submits that the totality of the circumstances of this case strongly suggest that the Court should not grant a writ of certiorari to consider the evidentiary question involving the testimony as to the effects of the Petitioner's crime on the family of the deceased and the surviving victim. It was at most a minor issue in a lengthy trial and hearing. It would raise a substantive issue best left to the states to resolve. And, finally, it was relevant evidence which was not unduly emphasized by the prosecution.

C.

The Petitioner's Failure To Object In The Trial Court To The Alleged Irrelevancy Or Inflammatory Nature Of The Testimony Relating To The Effects Of The Crime Upon The Surviving Victim And The Family Of The Deceased Is Reason Enough For This Court To Deny A Writ Of Certiorari On That Issue. Likewise, His Failure to Argue Either In The Trial Court Or Before The Illinois Supreme Court, That Consideration Of Non-Statutory Aggravating Factors Violates The Eighth And Fourteenth Amendments Is Reason To Deny The Writ Of Certiorari On That Issue.

The Petitioner has not properly preserved for review either of the arguments made in Point I of his Petition. With respect to the claim that consideration by the jury pursuant to Illinois statute, of non-statutory aggravating factors violated the Eighth and Fourteenth Amendments, the Petitioner failed to make the argument either in the trial court or in the Illinois Supreme Court. (R. 8302-8303); People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983). It appears that this Court is not inclined under these circumstances to consider such an attack on a state statute. C.f. Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317, 2321-25 (1983).

With respect to his argument that the probation officer's testimony relating to the effects of Petitioner's crime upon the surviving victim and the family of the murdered victim was irrelevant and inflammatory, Petitioner failed to make any such objection in the trial Court (R. 8054-8061). He did attempt to raise that issue before the Illinois Supreme Court, but it was held that he had waived the question by his failure to object. People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 240-241 (1983). Nonetheless, the Illinois court went on to discuss the testimony in question and the state of the law allowing broad leeway in the presentation of evidence at the death penalty hearing. Id.

The Respondent suggests that the Petitioner's failure to object in the trial court, even though he attempted to raise the issue in the Illinois Supreme Court, should also be considered by this Court as a basis to deny the writ of

certiorari. Cf. Estelle v. Williams, 425 U.S. 501, 508 n. 3 (1976). The record in this case is replete with evidence that the Petitioner was ably and vigorously represented by counsel at the trial of this case. It is very possible that the failure of his attorney to object to the testimony of the probation officer was a tactical decision on his part. The Petitioner had insisted on the pre-sentence investigation conducted by the probation officer and there was substantial favorable information which the Petitioner elicited from the witness. Thus, it seems apparent that the Petitioner may well have concluded that it would be desirable and more effective to elicit favorable information on cross-examination of the witness rather than attempting to bring it out through direct examination after objecting to the testimony in question. Moreover, he may have concluded that the actual impact of the crime, as elicited on cross-examination of the witness, was not as harmful to Petitioner as that which the jury would surmise in the absence of such testimony. In any event, having not given the trial court the opportunity to remedy any alleged error in the testimony, the Petitioner should not be allowed to litigate the question on certiorari.

II.

THE ILLINOIS SUPREME COURT REVIEW PROCEDURE IN DEATH PENALTY CASES COMPLIES WITH THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A brief reading of the Illinois Supreme Court's opinion in this case should demonstrate rather convincingly that the Illinois Supreme Court takes seriously its responsibility to thoroughly examine the record in death penalty cases so as to provide a check against the freakish or capricious imposition of the death sentence about which the Court was concerned in Furman v. Georgia, 408 U.S. 289 (1972). Moreover, the opinion in this case, as well as the other opinions of the Illinois Supreme Court in death sentence cases, reveal indisputably that the court also engages in a comparative review of all cases in

which the death penalty was imposed, so as to determine whether the circumstances underlying a given death sentence are so out of line with other death penalty cases as to indicate an aberrant decision by a jury or judge. See People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 242-243 (1983); People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 199 (1981). Finally, a review of the Illinois Supreme Court death penalty cases will also reveal that that Court does not hesitate to reverse a death sentence on such grounds. E.g. People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980); People v. Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 (1980).

The Respondent submits that the actions of the Illinois Supreme Court in this case, as well as in other Illinois death penalty cases, clearly establishes that its practice and procedure comply with the requirements of the Eighth and Fourteenth Amendments as discussed in Gregg v. Georgia, 428 U.S. 153, 204-207 (1976). This Court's assessment of the role of the Georgia appellate review procedure is equally true of the Illinois system.

> [It] serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg v. Georgia, 428 U.S. 153, 206 (1976).

The Petitioner's claim that this issue warrants consideration by this Court in this case falls far short of the mark. Notwithstanding his unsubstantiated conclusions and bold assertions of fact not of record, it should be rejected.

III.

THE FACT THAT ILLINOIS ALLOWS THE PROSECUTOR TO MAKE THE DECISION WHETHER TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Petitioner's efforts to distinguish the application of this Court's approval, in Gregg v. Georgia, of the Georgia statute's grant of discretion to the prosecutor, from the discretion allowed to the prosecutor under the Illinois statute, at best, amounts to a distinction without a meaningful difference. Although apparently conceding that this Court has sustained the validity of pre-trial prosecutorial discretion in bringing about a death penalty prosecution, Petitioner argues that to the extent the Illinois prosecutor can make that discretionary decision after a defendant is convicted, such discretion violates the "capricious imposition" requirements of the Eighth and Fourteenth Amendments.

The Respondent submits, however, that the relationship of the prosecutorial discretion to the charging of a substantive crime, as opposed to the seeking of the sentence after conviction, was not significant to this Court's reasoning approving such discretion in Gregg v. Georgia. Justice Stewart, writing for this Court, noted that relatively unguided discretion to remove a defendant from consideration for the death sentence exists in some entity or another both before and after convictions. Gregg v. Georgia, 428 U.S. 153, 199 (1976). The thrust of this Court's approval of such discretionary authority is that it may be employed to spare a person from the death penalty, but not to impose the death penalty. It is this latter authority to which the Eighth Amendment need for guidance is addressed. In seeking a death penalty hearing, a prosecutor does not impose the death penalty. All the safeguards of the Eighth Amendment remain between that stage and the ultimate decision. In not seeking the death penalty, at worst, a person who would have received the sentence is spared. The normal requirements of proving a

discriminatory practice would be sufficient to check any abuse of that discretion.

Justice White, in a separate opinion in Gregg v. Georgia, (and concurred in by the Chief Justice and Justice Rehnquist), noted that the argument attacking the prosecutorial discretion in that case is, "in the final analysis an indictment of our entire system of justice" and is unsupported by any facts to show abuse of the discretion. Gregg v. Georgia, 428 U.S. at 225-227. The same assessment can be made of the Petitioner's argument in this case.

Although he attempts to distinguish the Illinois statute by stating that the Illinois prosecutor does not have to refuse to charge a crime in order to avoid seeking the death penalty, that distinction is also without merit. Contrary to Petitioner's assertion at page 25 of his Petition, the capricious or ill-motivated decision by an Illinois prosecutor not to seek the death penalty would indeed be a breach of his duty and of the public trust.

Once again, there is no basis in fact for the assertion that the prosecutorial discretion at issue will be or has been abused. Petitioner's illustrative comparison of this case with People v. LaPointe (Petition at 24) certainly fails to establish any such abuse. The prosecutor in LaPointe (who happened to be the same prosecutor as in this case) may well have reasonably concluded that a jury or judge would not impose the death penalty on a young-looking, 18 year-old defendant with much stronger evidence of a real drug dependency life-style than that involved in the Free case, together with all the other circumstances in the case.

IV.

THE PETITIONER'S CLAIM THAT THE PROTECTIVE SWEEP OF HIS PREMISES VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS RAISES PRIMARILY, IF NOT SOLELY, A FACTUAL ISSUE RATHER THAN AN ISSUE OF CONSTITUTIONAL LAW.

Petitioner apparently concedes that "the concept of a protective sweep has been endorsed as a valid exception to the Fourth Amendment's warrant requirement because of the need for police officers to ensure their own safety or to seek out accomplices, due to the 'potentiality of danger surrounding the arrest.'" (Citation omitted) (Petition at 25). He then argues that the facts in this case do not meet the criteria for that exception. However, in affirming the trial judge, the Supreme Court of Illinois found that the Petitioner had to be tear-gassed out of his house and that:

> The officers knew that defendant had used a gun in the commission of the crimes. His brother-in-law had told the police that the defendant carried a handgun in his truck. When the defendant was captured, he did not have the gun. Although there was no evidence that the defendant had an accomplice in the commission of the crimes, one officer testified that he saw someone at both the front and back windows of the house before the defendant came out, and he could not be sure if both were the same person. Thus, the officers had knowledge that a violent crime had been committed, that the gun used had not been recovered, and that someone was possibly in the house who would have access to the weapon. There was a potentiality for danger surrounding the arrest which justified the "protective sweep" of the house.

People v. Free, 447 N.E.2d at 227.

The Court went on to find that, in fact, the police entered the house only for the limited purpose of the protective sweep. Id. This finding corresponded to the finding of the trial judge. Id.

The Respondent submits that the facts as found by the state courts clearly justified the application of the "protective sweep" exception. Even Petitioner would have difficulty disagreeing with that proposition. The Petitioner merely disagrees with the finding of fact that the protective sweep

was the reason for the entry by the police. He has had an full and fair opportunity to litigate this issue before the Illinois courts. It is essentially a factual question, and does not warrant further review by this Court.

Finally, Respondent points out that in addition to the classic protective sweep facts justifying the entry by the police in this case, there was an independent, though related, justification for the entry. As the Illinois Supreme Court found, having fired the tear gas cannister into Petitioner's house, "the police had an obligation to enter the premises, and determine whether there were persons present who either were in danger or posed a substantial danger to the police." People v. Free, 447 N.E.2d at 226. The Court went on to find that the police did enter the house for these reasons. People v. Free, 447 N.E.2d at 226-227. Since these "public service" exigencies, which do not fall into the classic "protective sweep" theory, also justified the entry in this case, it would not constitute an appropriate controversy in which to litigate the validity and scope of the "protective sweep" exception.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,
Assistant Attorney General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

THOMAS KNIGHT,
Assistant State's Attorney,
DuPage County, Illinois,

KENNETH A. FEDINETS,
Assistant Attorney General,

Of Counsel.

August 26, 1983.

No. 82-6881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES P. FREE, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

CERTIFICATE OF SERVICE

I, Michael B. Weinstein, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Alexander Stevas, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served.

I further state that this mailing took place on August 26, 1983.

BY: Michael B. Weinstein
Michael B. Weinstein
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

SUBSCRIBED and SWORN to before me this 26th day of August, 1983.

NOTARY PUBLIC